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Supreme Court of the United States

OCTOBER TERM, 1961

No. 312

IN THE MATTER OF THE PETITION FOR A WRIT OF HABEAS CORPUS FOR MERRITT W. GREEN, II, PETITIONER

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

PETITION FOR CERTIORARI FILED AUGUST 14, 1961
CERTIORARI GRANTED NOVEMBER 6, 1961

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

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[fol. 1]

IN THE COURT OF APPEALS OF LUCAS COUNTY, OHIO

IN THE MATTER OF THE PETITION FOR A WRIT OF HABEAS CORPUS FOR MERRITT W. GREEN, II.

PETITION FOR WRIT OF HABEAS CORPUS—Filed June 7, 1960

To the Honorable Court of Appeals, in and for the Sixth Appellate District of Ohio:

Your petitioner, Merritt W. Green, attorney for the above named Merritt W. Green II, respectfully represents that said person is imprisoned and restrained of his liberty by William Hirsch, Sheriff of Lucas County, Ohio, in the county jail thereof without legal authority, but under the color of a pretended commitment, a copy of which commitment cannot be procured at this time without impairing the efficiency of this remedy.

Your petitioner, therefore, prays that a writ of habeas corpus issue to said William Hirsch according to law and that the said Merritt W. Green II be brought before this Court forthwith and be discharged from said illegal imprisonment and restraint of his liberty.

Merritt W. Green

[fol. 2]

IN COURT OF APPEALS OF LUCAS COUNTY, OHIO

JOURNAL ENTRY ISSUING WRIT OF HABEAS CORPUS AND ADMITTING PETITIONER TO BAIL—Filed June 7, 1960

This day Merritt W. Green, appeared in open Court, and filed his petition for writ of habeas corpus on behalf of Merritt W. Green, II, alleging that the latter is imprisoned and restrained of his liberty under the color of a pretended commitment, but without any legal authority.

It is hereby adjudged that a writ of habeas corpus issue to William Hirsch, sheriff of Lucas County, Ohio, or who-

soever is charged with the custody of Merritt W. Green, II, to appear before this Court at ten o'clock a. m. on Thursday, June 9th, 1960, and to have the body of said Merritt W. Green, II, and to appear and show cause, if any, he or they may have of the taking and detention of said Merritt W. Green, II.

It is further adjudged that pending the hearing and determination of said cause said Merritt W. Green, II, shall be released from custody upon his giving bond in the sum of five hundred ($500.00) dollars with surety to the satisfaction of the clerk of this Court.

Lehr Fess, Dudley F. Smith, Clyde L. Deeds, Judges.

[fol. 3]

IN COURT OF APPEALS OF LUCAS COUNTY, OHIO

PETITIONER'S BILL OF EXCEPTIONS—Filed November 23, 1960

Be it remembered, that upon the Hearing of the above-entitled cause, in the Court of Appeals, Third District Court of Appeals sitting by designation, in the April, 1960, term of said Court, said Hearing commencing on Thursday, June 9, 1960, before Judges Raymond Younger, presiding, George S. Middleton and J. Thomas Guernsey, the following proceedings were had, to-wit:

• • • • • • •

Judge Guernsey: Mr. Friberg, do you grant that the lawyer was engaged in Interstate Commerce?

Mr. Friberg: Do I grant what?

Judge Guernsey: That the lawyer was engaged in Interstate Commerce?

Mr. Friberg: Employer, that is correct.

Judge Younger: Was the Temporary Restraining Order against peaceful picketing?

Mr. Friberg: The order is.

• • • • • • •

Judge Guernsey: Do you claim that notwithstanding these facts that the Trial Court still had jurisdiction to issue the temporary restraining order?

• • • • • • •

Judge Middleton: Any agreement between counsel as to the matter in which you are going to present these facts?

Mr. Green: Yes. You mean the record, to make up the record for you?

Judge Middleton: Yes.

Mr. Green: I think we can do that very quickly. I think one thing should be added, that I forgot, and it is germane to your request, there is presently on file and was on file, [fol. 4] there was filed that afternoon even before this petition was filed, and presently pending, an unfair labor charge before the National Labor Relations Board. No question on that.

Mr. Ragan: That unfair labor practice charge has since been dropped.

Mr. Green: As part of the strike settlement?

Mr. Ragan: Yes.

Mr. Green: But at that time there was an unfair labor practice charge pending all the way up through this proceeding until he was sent to jail, there was also pending in the National Labor Relations Board an unfair labor practice charge.

Judge Middleton: The Board take any action?

Mr. Green: No, as he said, when they settled the strike they agreed to dismiss all the actions, including the unfair labor action charge.

Judge Middleton: Prior to the dismissal had there been a recognition of the application?

Mr. Green: Had been docketed but not a hearing on it. But, there was an action before the Board.

Mr. Ragan: If the Court please, the unfair labor practice charge was not based on the contract. It alleged in a vague sort of way that the company, the employer, Toledo Marine Terminals, had refused to bargain collectively, although at the time it was filed negotiations were almost continuously under way. I don't believe it has any bearing whatsoever in this case.

Mr. Green: I think in order for the Court to properly have a complete record it is necessary that all of the papers and pleadings that are now a part of the original case, number 188631, wherein the Toledo Marine Terminals, Inc.

was the plaintiff and International Longshoremen's Asso-
[fol. 5] ciation and others were the defendants, are necessary. I think all of that is necessary, and I think with counsel can we agree?

Mr. Friberg: Let us introduce the entire Common Pleas Court file in the case.

Mr. Green: Yes, and that would include the petition which was filed initially, which has attached thereto a contract which is the so-called basis of the action of violation which indicates, I might parenthetically say, that the contract was not a completed contract. It will also include a motion filed by the plaintiffs for temporary injunction, a petition for removal to the United States District Court, a remand from the United States District Court, an affidavit of contempt filed by the plaintiffs against one picket, Roy Moon. I might say that by agreement of counsel and in Court's Chambers below, on Tuesday or Wednesday, that they agreed between them that the way to expedite this whole thing was for the union to bring in four of the pickets who were actually picketing on a contempt charge rather than filing some more, and then counsel for the union, the petitioner here, agree that he would stipulate that they were out picketing, so that they could try to get an immediate finding on the contempt action so the question could be heard some place along the line.

Judge Younger: The 4th one you named, "Remaned (sic) for the United States Court," was that refusing to take jurisdiction?

Mr. Green: Actually it was not a refusal. It reads, "Counsel for the defendants have agreed not to oppose the order of the Court remaned." (sic) It was by agreement of counsel that it should come on back here.

[fol. 6] Mr. Ragan: If the Court please, I would like to correct that statement. It was on the decision of Judge Kloeb, Judge Frank Kloeb, on the ground, including the fact that he felt that the Federal District Court did not have jurisdiction, and that the State Court had full jurisdiction.

Mr. Green: I respectfully disagree with that. Judge Kloeb said he had jurisdiction to take it on removal, no question about it. He questioned whether he had jurisdiction not because this Court had jurisdiction, because the

NLRB was the only one that had jurisdiction at that time, a labor dispute.

Judge Middleton: You are arguing.

Mr. Green: Yes, that is right. Yes, I think that includes everything except the three exhibits, pictures, which are in and are admitted, isn't that right?

Mr. Ragan: Yes.

Mr. Green: Pictures showing the picket line. It doesn't show any pickets, just shows an automobile sitting there, and I assume pickets sitting in there, and a sign saying "strike." No allegation or claim any place along the line that there was any violence, intimidation, public disorder, blocking of entrances or anything like that. This is strictly a peaceful picketing case. No claim that there was anything but peaceful picketing.

Judge Younger: The three pictures are not to be introduced?

Mr. Green: Yes, they are part of the court records below, and also part of this record here. Then there will also be the findings or the charge in contempt filed by Judge McCabe on Monday of this week, filed June 6th at 12:25 p. m. Now, and of course the return would be, and I think [fol. 7] there must be an order of commitment, although I don't see one in the file. The Court may have the order of commitment to the sheriff. I mean, it says here is a warrant to commit to jail.

Judge Guernsey: Returned along with the file of this habeas corpus action.

Mr. Green: The Court will notice that all of the contempt proceedings at every stage were all under this other number, and it doesn't change until it gets over here. Now, we would like to stipulate with counsel, and I understand from our previous hearing that they have no disagreement with this, that all of the evidence introduced at the hearings of the Court below be introduced as the evidence in this writ of habeas corpus proceedings, upon which the Court can give consideration in its determination. That would be the transcript of proceedings in contempt containing 34 pages, 1 to 34, and indicated that the proceedings were those of June 1, 1960, and then we would by agree-

ment of counsel introduce as part of this record before this Court the transcript of proceedings in contempt before the Honorable Judge McCabe on June 7, 1960, starting at page 1 and going through page 62. These are transcripts of testimony prepared by the official court reporter, but not certified because it didn't come up by way of bill of exception. Can it be agreed by and between counsel that that may be accepted as the evidence in this case?

Mr. Friberg: So agreed.

Judge Younger: Including the pleadings previously mentioned?

Mr. Friberg: Including the pleadings of and the entire Common Pleas Court file.

[fol. 8] Mr. Green: We do not have in this record the entry of dismissal, if it is of any importance, or I don't believe the docket sheet is in the file at this time showing the dismissal this morning of the original case. I say, it is of no particular importance.

Mr. Friberg: It may be stipulated that this morning a journal entry was filed dismissing with prejudice the case in the Common Pleas Court, which is numbered 188631. Is that what you want, Mr. Green?

• • • • • • •

Mr. Green: We agree that there was a motion to remand, and pursuant thereto the Court issued the Court order that is part of the file. If you want to put it in we agree.

Mr. Friberg: I would like to have it in the record, please.

Mr. Green: All right with me.

Mr. Ragan: The journal entry of course that was filed this morning is now part of the record.

Mr. Green: At this time I would like to have the petitioner sworn.

Judge Younger: The Court will receive the evidence offered, the pleadings, transcripts as counsel have agreed upon, that will be received and subject to its being, the Court's determining whether or not it is relevant and competent. If the Court concludes that it is not relevant

or competent, or any part of it is not we will rule upon it at that time.

• • • • • • •

Mr. Green: I asked this witness to be sworn because now being sworn I want to ask counsel if they will stip-
[fol. 9] ulate that if he were to testify here today under oath that he would testify to the same facts and testimony given in the Court below, through and by his counsel, reading his statement of testimony into the record after the Court refused to permit him to be sworn or to give testimony.

• • • • • • •

So, the purpose of this today is to have this lawyer's sworn testimony before the Court which would be the same testimony which appears in the transcript of the proceedings in contempt of June 7, 1960, starting at page 25 and continuing on through with some interruptions to page 39 of that same transcript. And again my request then is to ask counsel if they will stipulate that if he did proceed to testify under oath he would testify the same as he did there, and then we can save the Court a lot of time.

Mr. Friberg: We will so stipulate.

Judge Younger: The Court will take a five minute recess.

Mr. Green: I think that is the record.

Mr. Friberg: As far as I know those are the exhibits.

Mr. Green: Those contain, I think, all of the evidence we will put in.

Mr. Friberg: We have no evidence or testimony to offer.

Judge Younger: All right, we will be ready for arguments after recess. We will take a recess at this time.

(Recess at 11:00 o'clock a. m.)

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[fol. 10]

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

TOLEDO MARINE TERMINALS, INC., an Ohio Corporation,
Plaintiff,

vs.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION AFL-CIO,
LOCAL 1317-A, et al., Defendants.

PETITION—Filed May 27, 1960

1. Plaintiff, Toledo Marine Terminals, Inc. states that it is a corporation organized and doing business under the laws of the state, having its main office at 26 Main Street, Toledo, Ohio; that the International Longshoremen's Association, AFL-CIO, Local 1317-A, is not incorporated and is a voluntary association of individual persons known as a labor organization or union, and that the principal address of said Local 1317-A is to plaintiff unknown, and that for want of such information the residence address of defendant Roy Moon is believed to be the Toledo address of said Association. Plaintiff avers that Toledo Marine Terminals, Inc. is engaged in the business of operating a marine terminal, warehouse and terminal in the storage and shipping of various commodities.

2. Plaintiff avers that defendants, Roy Moon, Charles Walls, Milton J. Shoecroft and Cleo Syph, are officers, [fol. 11] business agents, representatives and members of said association and said association is the certified bargaining agent for the employees of the plaintiff, having been certified by the National Labor Relations Board on November 6, 1959.

3. Plaintiff states that defendants, John Albert and Sam Crawford, are representatives of said Local 1317-A and are acting in such capacity in the actions hereinafter complained of.

4. Plaintiff further states that other members of said association are unknown to plaintiff and that the questions herein involved are of common general interest to the defendants and to all of the members of said association.

5. Plaintiff further avers that the individually named defendants are members and authorized representatives of said class of members and are sued individually and as representatives of the class, and that a trial of the issues herein may be fairly had with the defendants named herein as representatives of such a class. Plaintiff further avers that each of the individual defendants are sued, not only individually, but as members and agents, and that said individual defendants, for and on behalf of themselves and as agents, officers, and/or members of said defendant association are acting herein in organizing, promoting, prosecuting and conducting the acts and actions hereinafter specifically set forth of which the plaintiff complains.

6. Plaintiff avers that at the time of the filing of this petition there is no labor dispute existing between plaintiff company and defendant association; that plaintiff has negotiated with the defendant association through its committee consisting of the said Roy Moon, Charles Walls, Milton J. Shoecroft and Cleo Syph since November 6, 1959, [fol. 12] the certification date of said association; that numerous meetings were held between the representatives and officers of plaintiff company and said defendant association and the individual defendants for the purpose of negotiating a labor contract; that said meetings were conducted in part between the representatives of plaintiff and defendant association and more recently were conducted with the assistance of the Federal Mediation and Conciliation Service represented by Commissioner Harry Gray of Toledo, Ohio; that on Tuesday evening, May 24, 1960, at about 10:30 P. M., full and complete agreement as to a labor contract was reached in the office of Commissioner Harry Gray; that on this occasion and on repeated occasions prior thereto the defendants were aided in their negotiations by Mr. Walter Weaver of Cleveland, Ohio, a vice president and business agent of the International Longshoremen's

Association; that upon the arrival of agreement and repeatedly prior thereto said defendants named in this action and the said Mr. Weaver assured the representatives of plaintiff that they were fully authorized to negotiate and sign a labor contract; that said representatives were specifically made by the said Walter Weaver and the defendants at the conclusion of negotiations and in the presence of Commissioner Harry Gray.

7. Plaintiff further avers that on May 15, 1960, defendant association called a strike at the premises of plaintiff and began picketing at the entrance thereto; that on Tuesday, May 24, 1960, at about 10:30 P. M. upon arrival at agreement said pickets were immediately withdrawn by defendant association and the members thereof returned to work on Wednesday morning, May 25 and continued their employment throughout May 25 and 26, 1960; that plaintiff [fol. 13] from and after May 24, 1960 upon arrival of agreement honored the terms thereof in all matters and particularly with reference to agreed upon increases in pay rates.

8. Plaintiff further avers that pursuant to the agreement arrived at between plaintiff and defendant association as above stated, on May 24, 1960, the terms and provisions of the contract were revised and that on May 26, 1960, said contract was signed by the plaintiff in the person of F. C. Greenhill, executive vice president, and by defendant association in the persons of said Roy Moon, Charles Walls, Milton J. Shoecroft and Cleo Syph; that said contract is a legal and binding labor contract as to both plaintiff and defendant association, and a copy of said contract is attached hereto as Exhibit "A".

9. Plaintiff further states that at about 6:00 A. M. on the day of the filing of this petition, namely, May 27, 1960, defendant association began picketing at the entrance to the property of plaintiff company at 26 Main Street, Toledo, Ohio; that the causes and reasons for said action on the part of defendant association are in direct violation of said contract and specifically Article IX, Section 3 (a), which provides as follows:

"There shall be no stoppage of work caused by lockouts, walkout, sit down or slow up of any kind or nature whatsoever during the term of this agreement."

10. Plaintiff avers that said conduct on the part of defendant association in posting of pickets at the entrance to the company premises and the calling of a strike by so doing is an illegal and unlawful act on the part of defendant association and the individual defendants; that a continuation of said illegal and unlawful conduct of the defendants, which will continue unless enjoined by order [fol. 14] of this Court, will result in danger to life and limb of the employees of plaintiff company and irreparable loss and damage to property of plaintiff company, and that plaintiff has no adequate remedy at law. Furthermore, plaintiff avers that the continuance of such illegal and unlawful conduct of the defendants will disrupt the operations of the plaintiff and trade and commerce generally at the premises of plaintiff and the Port of Toledo; that at the time of the filing of this petition a foreign vessel is berthed at the premises of plaintiff and that plaintiff is unable to discharge or load cargo by reason of the foregoing acts of defendant association; that a large volume of cargo for export is now on the premises of plaintiff and that several vessels are now en route to the premises of plaintiff for the purposes of having such cargo loaded aboard for export.

11. Plaintiff avers that the continuance of such illegal and unlawful conduct and the acts of the defendants and others associated and participating with them will make it impossible for the company to continue its normal activities and to preserve, protect, maintain and enforce its rights, and thus such conduct has created an emergency of such great and serious nature as to require the issuance forthwith of a temporary restraining order.

12. Wherefore, plaintiff prays that pending final hearing and determination of the issues herein, a restraining order be issued forthwith against the defendants and each of them, their officers, agents, members and other persons associated with and acting in concert with the defendants,

and all others to whom knowledge of this order should come, restraining and enjoining them.

a. from interfering in any manner whatsoever with the plaintiff, its officers, agents, representatives, em-
[fol. 15] ployees and others having business with plaintiff company; from interfering by force, violence or in any manner whatsoever, with those desiring to enter and leave the aforesaid premises.

b. from picketing in any manner at or near the vicinity of the aforesaid premises at 26 Main Street, Toledo, Ohio, since such conduct constitutes an illegal strike and is in direct violation of the terms and provisions of the labor contract as above stated.

c. from loitering, grouping or congregating at or near approaches to, or on a public street or highway leading to said premises, or on any premises of plaintiff company, or on any driveway or roadway leading to the premises of plaintiff.

d. from interfering in any manner with the ingress to, or egress from said premises by land or by water of any trucks, cars, ships, or other conveyances of any kind.

e. from protecting, aiding, abetting, or assisting anyone in the commission of the aforesaid unlawful acts,

and plaintiff further prays that upon final hearing said restraining order be made permanent, and for such other and further relief to which plaintiff may be entitled.

Robert C. Ragan, Attorney for Plaintiff.

[fol. 16]

EXHIBIT A TO PETITION

Labor Agreement Between Toledo Marine Terminals, Inc. of Toledo, Ohio and The International Longshoremen's Association AFL-CIO, Local 1317-A.

The following agreement made and entered into this twenty-fourth day of May, 1960, by and between Toledo Marine Terminals, Inc., a corporation of the State of Ohio, having its principal offices at 26 Main Street, Toledo, Ohio, hereinafter called the Company, and The International Longshoremen's Association, AFL-CIO, Local 1317-A, hereinafter called the Union.

Article I.

Bargaining Agent

Section 1. (a) It is hereby agreed by and between the parties hereto that whereas said Union has by merger succeeded the International Brotherhood of Longshoremen, AFL-CIO, and said International Brotherhood of Longshoremen has on November 6, 1959, been certified by the National Labor Relations Board as the exclusive bargaining agent for the employees of the company in the appropriate bargaining unit of the company as established in Case No. 8 RC 3325 by decision dated April 2, 1959, and reported in 123 NLRB 71, said above designated Union is hereby recognized and acknowledged as the exclusive bargaining agent for all employees in said appropriate bargaining unit for the duration of this contract in respect to all matters concerning wages, hours and working condition of employment for said employees. The term employee or employees, as used in this agreement, shall be deemed to mean those engaged in stevedore and warehouse operations, such as stevedores, warehousemen, crane operators, signalmen, winchmen, gang leaders, and checkers.

[fol. 17] (b) It is expressly understood that the articles of this agreement do not apply to superintendents, assistant superintendents, supervisory executive employees, clerical employees, professional employees, guards and supervisory

personnel as defined by law. The Company reserves the right to hire checkers under provisions of Article X, Section 1. (b).

Article II

Membership

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Article III

Maintenance of Membership

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Article IV

Basic Work Period and Overtime Pay

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Article V

Reporting Time and Working Conditions

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Article VI

Holidays

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Article VII

Starting Time

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Article VIII

Wage Rates

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Article IX

Grievances and Disputes

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[fol. 18]

Article X

Management Rights

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Article XI

Safety

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Article XII

• • • • • • •

Article XIII

Termination Date

This agreement shall become effective on May 24, 1960, and shall remain in full force and effect until the 1st day of April, 1961 and year to year thereafter, unless either party desires to modify or terminate the agreement and communicates this desire to terminate in writing at least sixty (60) days prior to April 1, 1961 or of any subsequent year.

Executed at Toledo, Ohio, this twenty-sixth day of May, 1960.

Toledo Marine Terminals, Inc.

By F. C. Greenhill
F. C. Greenhill, Executive Vice Pres.

The International Longshoremen's Association, AFL-CIO

By (NOT SIGNED)

The International Longshoremen's Association, AFL-CIO, Local 1317-A

By Roy Moon
Charley Walls
Milton J. Shoecroft
Cleo Syph

[fol. 19]
IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

AFFIDAVIT OF CONTEMPT—Filed May 31, 1960

Robert C. Ragan, being first duly sworn, states that he is attorney for the plaintiff in the above captioned matter, and that defendant Roy Moon and all other defendants in said matter, and others acting in concert with said defendants, have disobeyed the order of this Court made on the 27th day of May, 1960, directing that he and they be restrained and enjoined from

(a) interfering in any manner whatsoever with the plaintiff, its officers, agents, representatives, employees and others having business with plaintiff company; from interfering by force, violence or in any manner whatsoever, with those desiring to enter and leave the premises of plaintiff.

(b) from picketing in any manner at or near the vicinity of the aforesaid premises at 26 Main St., Toledo, Ohio, since such conduct constitutes an illegal strike and is in direct violation of the terms and provisions of the labor contract between the parties.

(c) from loitering, grouping or congregating at or near approaches to, or on a public street or highway leading to said premises, or on any premises of plaintiff company, or on any driveway or roadway leading to the premises of plaintiff.

(d) from interfering in any manner with the ingress to, or egress from said premises by land or by water of any trucks, cars, ships, or other conveyances of any kind.

[fol. 20] (e) from protecting, aiding, abetting, or assisting anyone in the commission of the aforesaid unlawful acts.

and that the said Roy Moon, other defendants herein and those acting in concert with said Roy Moon, by reason of

the foregoing, are guilty of contempt of this Court, and that it is within the power of said defendants to obey said above orders of the Court.

Robert C. Ragan

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

TRANSCRIPT OF CONTEMPT PROCEEDINGS OF JUNE 1, 1960

before the Honorable John M. McCabe, Judge of the Court of Common Pleas, Lucas County, Ohio, 3:30 P. M., June 1, 1960.

The Court: In this action a petition was filed by the Toledo Marine Terminals, Incorporated, against some eight defendants, consisting of the International Longshoremen's Association, AFL-CIO Local 1317-A, and that upon the presenting of the petition and a motion for a temporary injunction and the statements of the attorney for the plaintiff, this Court granted the temporary injunction and set bond at $400.00. Now, I think it might be fitting at this time for counsel to make a brief statement of the history of this action, so that we may have a background—

Mr. Green: Before we begin proceedings, on behalf of the defendants herein I would like to say this, we are here especially to object to the jurisdiction of the Court and we are not appearing here in any way to submit ourselves to the jurisdiction of the Court. I say that beforehand, to preserve our—

[fol. 21] The Court: I suspect you expect a statement of that sort. It isn't that kind of a case, though.

Mr. Ragan: If the Court please, Local 1317-A, International Longshoremen's Association, was certified as the bargaining agent for the employes of the plaintiff company on November 6th of last year. Shortly thereafter a short-term contract was entered into between the International Longshoremen's Association and the plaintiff company, by the four defendants who are now present here in the Court, Roy Moon, Charles Walls, Milton J. Shoecraft and Cleo Syph. That contract extended for a period from the certification date of November 6th to December 15th. Also

participating in those negotiations was the International Vice-president of the I. L. A., Mr. Walter Weaver. The contract was intended and did serve the purpose of allowing the men to work out the remainder of the 1959 shipping season, and shortly after the first of the year negotiations were resumed to set up a contract for the future. During all the negotiations, and they were numerous, the four defendants I mentioned and Mr. Weaver participated in the negotiations; in the latter stages, in the last three weeks they have had the participation of the Federal Mediation man himself, Commissioner Harry Graves, of Toledo; the contract agreement had not been entered into by May 15, and picket lines were placed at the entrance of the company property at 26 Main Street in East Toledo; on May the 22nd, a week ago last night, in the office of the Federal Commissioner a contract agreement was arrived at. Now, throughout all the negotiations that I have outlined, the four defendants who are now here in Court, and Mr. Weaver reputedly represented to the plaintiff and myself, the representatives of the plaintiff, and to Commissioner [fol. 22] Graves, that they did have the authority and the ability to negotiate and sign a labor contract; a week ago last night that contract was arrived at, and immediately the picket lines were taken away from the entrance of the company property. The men returned to work the following morning, last Wednesday morning, and worked all Wednesday and Thursday, and on Thursday afternoon the contract, which is attached to the petition in this case, was signed by these four gentlemen who are present here, Roy Moon, Charles Walls, Milton Shoecraft and Cleo Syph, and that contract was signed last Thursday afternoon, and the following morning, Friday morning, pickets again were placed at the entrance of the plaintiff company's property. As the Court stated in his opening remarks, the petition was filed then on Friday afternoon, the same day, asking for a preliminary injunction, also asking for a temporary restraining order, which was granted and a bond filed. The four gentlemen who are now before the Court, after being in Chicago last Friday on union business, they could not be served until Saturday morning, but then they were served by the sheriffs office with a

copy of the petition and the Court's restraining order on Saturday morning; nevertheless the picketing continued throughout Saturday, Sunday and Monday, and yesterday morning we filed here an affidavit in the Court, asking for a citation of contempt; that picketing, none the less, Your Honor, has continued, and I was informed late this morning that there were five or six pickets at the entrance to the company's premises, and for this reason, with that history and background, we are prepared to introduce evidence, if the Court requires, to sustain the statements and allegations I have made, and we ask this Court to consider this contempt.

[fol. 23] Mr. Green: Your Honor, if it will hasten, or serve to hasten the sufficiency of this procedure, the defendants are willing to concede that there is picketing continuing at the premises designated in the petition; as we have said on several occasions in our discussions of this matter, the grounds upon which this petition was filed and the action set forth in the petition is one alleging a violation of the no-strike clause of an alleged collective bargaining contract between the Toledo Terminal Railroad and the Longshoremen's Association, Local 1317-A—

Mr. Ragan: Let me correct you on that, Toledo Marine Terminals, Inc., not the Terminal Railroad Company.

Mr. Green: Excuse me; in other words, in the first place, we want to say that this is an alleged contract, because we firmly believe and our position here is that the individuals who signed this contract had no authority to do so. However, I do not think that this is a matter that is presently before this Court, I don't think—

The Court: You are correct in that; that is not before the Court.

Mr. Green: I don't think any discussion of it will be fruitful except to show that this matter has been brought to the attention of the National Labor Relations Board; an unfair labor practice charge has been filed against the employers for failing to bargain faithfully; that matter has been docketed in Cleveland, No. D-C-A, 2168; as we have indicated before, in our discussions before, we have felt all along, and I will make this as brief as possible,

because I know the Court is very busy, we felt that when an order is made by a Court which lacks jurisdiction over the subject matter of the action, it can not be a valid order, and therefore no process for contempt can issue in the [fol. 24] face of its invalidity. We charge that this Court does not have jurisdiction by virtue of the fact that the National Labor Management Relations Act has been amended, and since 1947 reposes the entire jurisdiction over this matter in the National Labor Relations Board, that this clause of a collective contract which has been violated, if we take the statements of the employer as correct, which has been violated by picketing and this picketing ensued without the necessary notification being given—

The Court: That is the positive point, this Court—

Mr. Green: Well, let me—

The Court: This Court—

Mr. Green: I beg your pardon.

The Court: That is the positive point that is before the Court today; I want to know from these men when they received a Court order, whether they acted on their own notion of whether or not a Court order means anything or whether they had been told to disregard the order of the Court. That's the matter that is before the Court this afternoon, that I want to know; it is a simple matter on these things that you are now claiming that you wanted to assert them, to come into Court, they should have done so, but they didn't do that, some one told them that it was a smart thing to do, it was quite in keeping with the general principles of our country to disobey Court orders, disregard them. They are men of honor—they should be; they signed the contract; they know they signed the contract; instead of coming in and making an approach to the Court with respect to this injunction, some one told them, —they either acted on their own initiative or some one told them it was a smart thing to disregard the Court order. The Court might not have jurisdiction; I don't [fol. 25] know; perhaps some of these preliminary matters should have been cared for. They know that they negotiated for a couple of months, and these same men signed the contract.

I belong to a profession that has some regard for the oath of an individual or the honor of an individual; if you sign a contract and agree to do something, do it or explain why it can't be done. Lawyers take the word of other lawyers and will advise the Court to accept those words as golden. But here is a group of men who evidently have no regard for their own statements; they signed a contract and then they go out and immediately after that picket the place. Now, some one told them it was a bright, smart thing to do, to disregard the order of the Court, to pay no attention to that. That is the point we have here today. It might well be that after we get into the order there might be some things that should have been done in the negotiation of the contract, but this is no way to approach that problem at all, positively not. You obey orders of the Court. You are a judge, you expect your orders to be obeyed; you know that, and you as a lawyer could have advised them, "No, there is an order and you are going to have to abide by the order, but I will go into Court and I will file a motion and they will take that into consideration." No; they either told you that they were not going to abide by this order of the Court, or some one else very, very smart told them that that was the proper approach to make; when the Court made an order—disregard it.

This is a new experience to me, and I have been around a long time. This is the first time that anyone ever violated an order of the Court. Wouldn't it be just as proper [fol. 26] for them to simply say, "Throw it in the waste basket, disregard it.", and get away with it; there is the government; I am just a judge of the Court, and why any one individual thinks that they are superior to the government and those in authority in the government is certainly just beyond me. Now, we are headed in that direction unless Court orders are obeyed; there would be no object in having any Courts at all, we would just move on from one thing to another.

I want to find out from these men whether that was original with them, whether they thought the thing to do was to disregard the order of the Court. They got the order; they knew it was an injunction; some one told them

to disregard the order of the Court. Now, some one who knew what they were talking about would say, "No, you can't disregard the order of the Court; you should have some one go in and approach the Court and point out these things to the judge." He didn't do that. Now, if they are going to go on and disregard Court orders, I want to know it right now and I want to find out from these men whether they acted upon their own initiative or whether some one told them that was the thing to do. That is what I want to know. Now, I will give you until Friday at 10:00 o'clock to purge yourselves from contempt, and at that time I want you to come in and explain your action in this matter and why you would wholly and completely disregard the order of the Court—not what you think or what some lawyer thinks about it, that isn't material at all. When some one takes the law in their own hands and says, "Don't pay any attention to the Court," I want to know it now, whether they are going to proceed in this fashion or whether they are going to have the orders of the Court [fol. 27] honored in some fashion. A person of honor wouldn't sign a contract and then go out and violate it. If a man signs a contract, it certainly means something. That is all I am going to say; I give you until—unless some one else wants to say something.

Mr. Ragan: Yes, I have one thing I would like to say, Your Honor.

The Court: All right.

Mr. Ragan: I would like to say that the Toledo Marine Terminals man signed this contract at approximately 10:30 Tuesday night; when these men returned to work on Wednesday morning they started to work at the pay rates included in the contract, although the contract was not formally prepared at that time or signed until Thursday, but the company considered it was a valid contract existing from the moment in Commissioner Graves' office when the agreement was arrived at in the presence of Commissioner Graves and Mr. Weaver and these four gentlemen. Thank you, Your Honor.

The Court: I want to say, too, for the benefit of these people here, that in this time that you have to come in and purge yourselves of this contempt, I just want you to

remember that you are the ones who signed the contract, and you are the ones who violated the order of the Court, and I want you to be prepared at that time to tell the Court how you expect to be purged of contempt of Court. Now, that's all the question we have here, the only question before this Court.

Mr. Green: Your Honor, it was my understanding that they would be cited for contempt and we would be ready to appeal the ruling—would you just mind telling me, —if your Honor will—

[fol. 28] The Court: I want to know from them before that can be done, give them an opportunity to purge themselves.

Mr. Green: Your Honor—

The Court: I want them to explain to me why they violated the order of the Court.

Mr. Green: I can—

The Court: I want them to tell me whether they just did that or whether they were told by some one to do that; I want to know.

Mr. Green: I can advise the Court now that they were told by me.

The Court: Well, what—to violate the order of the Court? Did you tell them that?

Mr. Green: If the Court will just allow me to recall for both the attorneys for the Toledo Marine Terminals and for the Court and for myself some of the proceedings that have led up to this incident, I will. In the first place, an order was placed, an injunction was placed ex parte against this union.

The Court: That's right.

Mr. Green: Last Friday morning. This was after I had called you and asked you specifically to have a hearing.

The Court: I am not going into that at all.

Mr. Green: Let me explain, Your Honor, I think I can explain why, at least I can tell you in sequence why we have resulted in having to be here before you now in a contempt proceeding. Now, then, I came to you that same day and asked you if we would have a hearing, and you told me that there would be no hearing on this matter; you later suggested that if I could get Mr. Ragan to agree

to a hearing on the injunction which was already issued—

The Court: That's right.

[fol. 29] Mr. Green: —that you would have a hearing. Now, we couldn't get in touch with Mr. Ragan; it seemed very questionable that Mr. Ragan after once having had his day in Court and having received what he wanted, would come back in here for a hearing on this matter; that afternoon at four o'clock you refused to have a hearing because you felt it was too late. I asked you whether we could have it on Tuesday, and you said "No." You also told me that you did not feel that any other Court in this building could hear the matter even on the jurisdictional question; I don't mean on the contempt but only on the jurisdictional question. I was also told that on Tuesday you could not hear it and it was likely I wasn't going to get a hearing the rest of the week.

The Court: Then you went into the Federal Court.

Mr. Green: I will get to that.

The Court: And got thrown out over there.

Mr. Green: I had only two ways to go at it; let me say this, that this Court had no jurisdiction—

The Court: That is beside the point.

Mr. Green: And consequently a contempt on the basis of an invalid order cannot stand.

The Court: That is beside the point.

Mr. Green: Well, it is not beside the point.

The Court: You could at least obey the order of the Court and then come in and express whatever criticism you had and purge yourself.

Mr. Green: There were only two ways we could do this.

The Court: You could wait until we had a final hearing on the entire matter; that was the only way you could have done it; you could obey the order of the Court.

Mr. Green: No, we could not have done it that way. Then my clients would have had to give up the only vital [fol. 30] right they had to bargain. The only other way this matter could have come up is the way it did come up, that is, by a contempt action in this Court, because this is the only way this matter could have been heard. I will say to this Court that on Friday after the hearing of the Board of the International Longshoremen's Association in Chi-

cago, where they were negotiating this matter, I explained the entire situation to them and they were reluctant to give up their rights as far as their economic rights were concerned and it was apparent that this Court had made a Court order that was invalid on its face.

The Court: But that was before it was ever submitted into Court you did that.

Mr. Green: Oh, there is no question about that.

The Court: Why, sure, there is no question about that.

Mr. Green: This is the first time I have had a chance to submit it to the Court.

The Court: After the injunction was issued, I still say I want to know whether they acted on their own initiative in this matter or whether some one told them to disobey the order of the Court.

Mr. Green: I have said, I have already said to the Court that they obviously did not act on their own initiative.

The Court: Who did?

Mr. Green: Well, they were—

The Court: Who did?

Mr. Green: —instructed to do so by their superiors in the union in this case according to their own agreement, after they were advised by counsel that the order was not—

The Court: That is a contempt of Court.

Mr. Green: Your Honor—

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[fol. 31] The Court: They can either go back to work or they can come in here on Friday morning at 10:00 o'clock and purge themselves of contempt. I don't know how they are going to do that; then at that time we will talk about the penalty which is to be imposed; but the next step is—I don't know what it will be, but I don't want these gentlemen to be too much frightened about all this. It is apparent that they received bad advice, I say that to you, very bad advice; don't you ever take advice like that again, to ignore an order of the Court; whether it was right or whether it was wrong, you must respect the Court.

Mr. Green: Your Honor.

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY

TRANSCRIPT OF CONTEMPT PROCEEDINGS OF JUNE 3, 1960

Thereupon at 12:04, Friday, June 3, 1960, the Court resumed its session, and thereupon the following transpired:

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Mr. Green: Just a minute; once again I would like to state to the Court and for the purpose of the record that we are not here to submit to the jurisdiction of the Court, but especially to object to that jurisdiction.

The Court: Well, we will take first things first. First, of course, will be the violation of the temporary injunction, then I think the affidavits and motion for order in contempt; that was the next step that was taken and that is still pending before the Court. However, there are other matters preliminary to this contempt proceedings that must be cleared up before the Court is prepared to proceed. This is a temporary order, and that has been violated; let's find out why it was violated. They are here today to purge themselves of contempt and I refer specifically to the gentlemen who were here the other day; you may proceed in any way you want to, or you see fit.

• • • • • • •

[fol. 32] The Court: We are here concerned with one thing, that is the action here for contempt for violating the temporary order of the Court, which was made and which has been violated, so we will take that up first.

• • • • • • •

The Court: All right. As I understand it, what we are now pursuing is the course of determining whether these gentlemen who have apparently been identified are here to purge themselves of contempt. That is the first thing. They have the burden of coming into Court and purging themselves of contempt. They are now in contempt for having violated an order of the Court, a temporary order of the Court. Now, then, you may proceed to determine whether these gentlemen can purge themselves of this contempt.

• • • • • • •

Mr. Ragan: We have no further evidence, Your Honor. I would like to offer the pictures, Plaintiff's Exhibits 1, 2 and 3 in evidence.

The Court: Is there any objection?

Mr. Green: We have no objection.

The Court: Any objection?

Mr. Green: No objection.

The Court: They will be received in evidence. Well, now, I think we should hear from these gentlemen who are held in contempt. Whether they are represented or whether they are not represented, they may individually or through counsel purge themselves of their contempt. It is very apparent from what has been tendered this morning that they are in contempt of Court. The opportunity is always given, of course, to any one who has violated an order of the Court, to purge themselves if they choose [fol. 33] to do so; so I think they should be called upon; well, I don't know whether they are represented by any one or not.

Mr. Green: You mean these gentlemen?

The Court: Yes.

Mr. Green: They are represented.

The Court: By an attorney?

Mr. Green: They haven't taken my license away yet.

The Court: Well, what do you propose to do?

Mr. Green: If the Court please, assuming they are resting, I propose to rest also, Your Honor. We are really here in a criminal proceeding and my clients are not required to testify in such a general action, they are not required—

The Court: You also advised them to violate an order of the Court, too.

Mr. Green: I did.

The Court: You did. That may go on to the record, that the attorney appearing for these four defendants having violated the temporary injunction issued by this Court, and that he also advised them now not to take the stand to purge themselves of that contempt. Is that correct?

Mr. Green: I said, Your Honor, that I did not conceive that they could be called in a criminal proceedings to testify against themselves. I believe that this is a quasi-

criminal proceedings, and that the law is clear in this matter.

The Court: Do they wish to purge themselves from contempt of Court for violation of the Court order which has already been violated?

Mr. Green: On behalf of all four men, Your Honor, I would just make this statement, that they do not wish to proceed further in this matter.

[fol. 34] The Court: All right, now, I will—we will proceed from there. It is very apparent from what you have said here this morning that you are in contempt of Court. Now, I will give you until next Tuesday to purge yourself of contempt of Court, and you may select a lawyer of your own choosing; if you don't select a lawyer of your own choosing, I will appoint an attorney for you to represent you. I don't want you representing yourself. When you are violating the order of the Court and the orderly procedure of the Court, and you contemptuously brazenly tell the Court that you are violating the order of the Court, let's find out about that, and I don't want you representing yourself in a serious matter of this sort; I don't want that. You may select a lawyer of your own choosing, or I will appoint an attorney for you. I will give you until next Tuesday to purge yourself of contempt of Court. You stand from what you said here this morning in contempt of Court, very definitely. I guess that's all.

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Mr. Green: Your Honor, I have taken the only course open to me, but I don't feel that we are in contempt of Court. I don't want to discuss that at this time, I am not concerned with that at all.

The Court: You have taken the onus off them, you have done that.

Mr. Green: In other words, they are not in contempt of Court?

The Court: I did not say that. They are in contempt of Court, but you are not allowing them to purge themselves of contempt of Court; you are standing in front of them, saying they are not going to say anything in their own behalf; that is what you are saying.

[fol. 35] Mr. Green: Well, Your Honor, if that is the case, then I will allow them to say anything they want to in their own behalf. The only thing I want understood is—

The Court: I am telling you, your clients are in trouble. I don't care to sit here for an hour or two arguing with you.

Mr. Green: I am not arguing the case with you.

The Court: I have told you two or three times now what you can do, you have taken the full responsibility upon your own shoulders, so it rests until you purge yourself, and I feel that it is so serious, and you do not realize the seriousness of your own actions, and that is the reason I want to be fair with you, as fair as I know how to be, and I want you to select lawyers of your own choosing, and if you do not, I will select lawyers for you, men of ability, of integrity and honor, to represent you. That is what I will do. Well, I guess that is all; I can give you to Monday to select your own lawyers; if not, I will appoint an attorney for you. I don't want these men to get any strange notions about this kind of smart aleck attitude here, in defying an order of the Court, a temporary order of the Court; you are privileged to secure other lawyers if you wish; that is up to you. All right, that is all.

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY

CHARGE IN CONTEMPT—R. C. 2705.02; 2705.03—
Filed June 6, 1960

Whereas, the undersigned judge of the Court of Common Pleas of Lucas County, Ohio, did on May 27, 1960, in the above captioned case, grant an order restraining and enjoining the defendants and other persons associated with and acting in concert with the defendants, and all others to whom knowledge of said order should come, from committing certain acts set forth in said petition; and,

[fol. 36] Whereas, one Merritt W. Green, II, legal counsel for the defendants, did with full knowledge of said restraining order, advise and counsel said defendants to disobey said order; and

Whereas, said defendants and others, acting on the advice and counsel of said Merritt W. Green, II, did disobey

said order by continuing picketing at or near the vicinity of the premises of the plaintiff at 26 Main Street, Toledo, Ohio, and

Whereas, said Green, after being notified in open Court by the undersigned, that he was in contempt of Court did and does continue to advise the said defendants to continue to disobey said order of the Court;

Said Green is hereby charged with being in contempt of Court, and a hearing thereon is set for June 7, at 10:30 o'clock, a. m., and the clerk is instructed to enter this charge on the journal of the Court.

John M. McCabe, Judge of the Court of Common Pleas, Lucas County, Ohio.

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY

TRANSCRIPT OF PROCEEDINGS IN CONTEMPT—June 7, 1960

before the Honorable John M. McCabe, Judge of the Court of Common Pleas, June 7, 1960, at 10:30 a.m.

The Court: This is civil No. 18631, Toledo Marine Terminals, Incorporated, and so forth, against the International Longshoremen's Association and so forth, and others. The matter has been before the court for the past week. It came to this court on May twenty-seventh, in which this court at that time granted a temporary restraining order—a temporary injunction. The matter has gone on from day to day; each day has been a violation of the court's order, [fol. 37] and, so far as this court knows, they are still violating the order of the court. It was so necessary under the circumstances here to do something about it, so yesterday, June sixth, an order was filed in this court charging one Merritt W. Green, the second, in contempt. Briefly, this order says this:

"Whereas, the undersigned Judge of the Court of Common Pleas of Lucas County, Ohio, did on May 27, 1960, in the above captioned case, grant an order restraining and enjoining the defendants and other persons associated with

and acting in concert with the defendants and all others to whom knowledge of said order should come, from committing certain acts set forth in said petition; and,

"Whereas, said Merritt W. Green, II, legal counsel for the defendants, did with full knowledge of said restraining order, advise and counsel said defendants to disobey said order; and

"Whereas, said defendants and others, acting on the advice and counsel of said Merritt W. Green, II, did disobey said order by continuing picketing at or near the vicinity of the premises of the plaintiff at 26 Main Street, Toledo, Ohio, and

"Whereas, said Green, after being notified in open Court by the undersigned, that he was in contempt of Court did and does continue to advise the said defendants to continue to disobey said order of the Court;

"Said Green is hereby charged with being in contempt of Court, and a hearing thereon is set for June 7, at 10:30 o'clock A.M., and the clerk is instructed to enter this charge on the journal of the Court."

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[fol. 38] Mr. Green: The court reporter will have the record show that Merritt W. Green and Robert Burns are appearing here as counsel of record on behalf of Merritt W. Green, II, and we are here pursuant to the order issued to the respondent, Merritt W. Green, II on last Friday in court, to appear today with counsel and purge himself of contempt of court then found, and of course pursuant to the piece of paper that Your Honor caused to be filed yesterday, the record should show that our—we are taking the position at this time that has previously been taken by the respondent, that this court is and has been without jurisdiction of the subject matter.

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Mr. Green: I would like to have it understood now that if I take a position contrary to what the court sees is the issue, it is for the purpose of making up the record, and I believe we can agree now, can we not, that I have the right to make up a record.

The Court: You have a right to make up a record, but don't go over any matters that are not now before the court.

Mr. Green: Well, in order for us to set up a record for an appellate court it will be necessary for us to get in the record, over the objection of the court, over the rulings of the court, what we think is proper here, whether it is by way of an offer to prove or whether it is by putting it in with the court's ruling, so that a higher court can determine whether or not it should have been in here, because I think you are aware of the fact that if it isn't in the record, that it would be impossible for us to assert to the higher court that it should have been, and so forth because—

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[fol. 39] The Court: May I set you right; we are not touching upon the merits of this case; the only question is the issue of the restraining order, which was violated.

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Mr. Green: But the thing that you say that may not be an issue in this contempt proceeding at this moment, a higher court may think it is properly an issue and therefore I think I have a right to and must insist to the court that those things that we are presenting, even if they touch upon a matter which you think are not in issue, must be brought into the record for the Court of Appeals.

• • • • • • •

The Court: To set you right, there is only one issue before this court, and that is this contempt proceeding for violating the order of the court on May 27th of 1960, and a continuing violation each day from that time down to date, and each day constitutes a violation and a separate offense. Do you know that?

Mr. Green: Your Honor, I will agree that the issue before the court is as to whether or not the respondent is in contempt of court—

The Court: That's right.

Mr. Green: Now, in order to determine that for a higher court to determine that question because this court has already determined that he is in contempt—

The Court: That is right.

Mr. Green: It may be necessary for us to put into the record matters which you may not think are pertinent, but the one—I agree the only issue is whether he is in contempt of court—

The Court: Correct.

[fol. 40] Mr. Green: In order to have somebody determine that other than this court, we believe it necessary and we believe we have a right to introduce in evidence by way of mitigation or whatever you want to call it—

The Court: I don't call it anything. I am calling it contempt of court.

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Mr. Green: We again deny that the court had jurisdiction over the order which the court says has been violated by the respondent to date.

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Mr. Green: Now, may I ask of the court what is conceded to be the posture of this case today?

The Court: He is in contempt of court, I told you.

Mr. Green: Has the court already—let me ask it this way—are we—is my client here only for the purpose of being sentenced for the contempt that the court alleges that was found in him?

The Court: That is correct, Mr. Green.

Mr. Green: Well, then, as I understand it, the only thing is is up here for his defense—

The Court: That's right; he is in contempt of court. I told him that repeatedly.

Mr. Green: Well, that—

The Court: But he disregarded it.

Mr. Green: I want to know what is the procedure then, I want to know what procedure to follow.

The Court: The procedure is he is here in contempt of court. The court must punish him for contempt of court. I take it that you have consulted the courts on this matter earlier; I take it you have read the Supreme Court decisions on matters of contempt; I know your son didn't. I thought maybe you might.

[fol. 41] Mr. Green: The only thing I am trying to find out, what are we here for today?

The Court: I repeatedly told you.

Mr. Green: Are we for hearing or trial or what?

The Court: You are not here for any hearing or trial. You can not challenge the jurisdiction of this court; that is gone, but you are here only on one thing, Mr. Green, and it must be clear to you that the court issued an order on May twenty-seventh and that order was disobeyed.

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Mr. Green: So, prior to sentencing, in view of the fact that the court has already found him in contempt—

The Court: That's right—

Mr. Green: In mitigation, that is all I can say, I am going to ask the respondent to be sworn, put under oath, and I think he has that right.

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Mr. Green: And tell for the record under oath exactly what transpired from the very beginning of this case. I think he has that right, Your Honor, and I as counsel believe I have that right to speak on his behalf, or he can himself—and I will repeat exactly what he would testify to you under oath. I am asking that privilege so that the upper court will have before it all the facts pertaining to what—whether or not there was a request to dissolve this restraining order or whether the court's jurisdiction was not officially challenged and whether or not this court could not—did not refuse and has refused right to this day to give us a hearing.

The Court: Oh, please, Mr. Green, don't follow in the same channel.

[fol. 42] Mr. Green: I am not following in the same channel. I am asking the privilege of putting the respondent on the stand—

The Court: No. The courts have made the pronouncement on that.

Mr. Green: I would—

The Court: You are too late for that. You are too late.

Mr. Green: I understand that the court is refusing counsel for the respondent and the respondent the right to any mitigation, because you have already found him in contempt?

The Court: That's right.

Mr. Green: Without further hearing, without a trial. That you are refusing to let either counsel or the respondent to show or say for the record in mitigation to this court, everything that transpired—

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Mr. Green: I would like to ask the court to answer that question; it is important.

The Court: I have told you that he is in contempt of court, repeatedly, in contempt of court, because he has stood before this court on two or three occasions and told this court that he was violating it and his clients were violating the order of the court.

• • • • • • •

Mr. Green: You mean to tell me that you are forbidding us to put into the record everything that transpired so that a higher court could determine the fact, whether a lawyer is guilty of contempt of court, whether he acted in a manner that was contemptuous?

The Court: Mr. Green, there is nothing before this court on the theory that you now advance.

Mr. Green: But it has to be before the court, Your Honor.

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[fol. 43] Mr. Green: This is the record I want to read into the record, what the respondent would testify to if permitted to testify under oath, • • • as already indicated.

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Mr. Green: Yes; that is why we want to put it in the record because you see it would be hard to perfect an appeal—"At about 9:30 A.M. on the 27th day of May, 1960, I received a telephone call from Mr. Ed Doherty, Port Agent for the Seafarers International Union in Toledo who inquired as to whether I would be available to represent the I.L.A. in their labor dispute with The Toledo Marine Terminal."

The Court: This is the attorney, I understand, talking in their office, is that right?

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Mr. Green: I am putting in the record what he would testify—

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Mr. Green: This is being put in the record by way of an offer to prove because the court has refused to let us put it in otherwise.

The Court: I don't want the record cluttered up with a lot of irrelevant things which has no value to anybody, completely and wholly outside the point in question.

Mr. Green: Well, this is being offered in the nature of making up the record in view of the court's ruling that we have no right to put it in and we certainly have a right to preserve our record.

The Court: I didn't say you didn't have any right. You say anything you want to say except don't get in contempt of court again.

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[fol. 44] Mr. Green: Continuing,—

"in their labor dispute with The Toledo Marine Terminal. After assuring him that I would, I went directly to the Seafarers Hall and after consulting with members of the I.L.A. who were present, and after determining that the officers of such union were in negotiations in Chicago I immediately telephoned that City to confirm my representative capacity.

"I spoke to Mr. Pat Sullivan, an official of the Great Lakes District of I.L.A. who explained in detail the position of the union with respect to the alleged contract and at that time was advised that Mr. Robert Ragan represented the Toledo Marine Terminals.

"I immediately sent word to the men in charge of the picket lines instructing them to reduce the number of pickets to as few as possible and to send home any men who had been drinking. While still at the Union Hall and at approximately 11:00 A.M., I was able to contact Mr. Ragan and advised him that I represented the union which fact he acknowledged but offered no further information, respecting his intentions.

"I then returned to my office where I immediately contacted the Clerk of the Federal District Court, Clerk of the

Common Pleas Court and the Assignment Commissioner of the Common Pleas Court to advise them that I represented the union and that should a suit be filed requesting an injunction that I would be available for an immediate hearing and requested them to contact me immediately or to at least advise the Judge to whom the case was assigned of such fact.

"In the meantime I discussed the jurisdictional question with my associate in the practice of law and we both agreed [fol. 45] that under the circumstances the State Court did not have jurisdiction and reinforced our opinion after examining the BNA Labor Expediter.

"While we were discussing this matter I received a telephone call from Mr. Irving Friedman in Chicago, the general counsel of the I.L.A. for the Great Lakes District. We discussed generally the contract and the possibility of an injunction suit being filed and he agreed with our opinion that the State Court lacked jurisdiction over the matter.

After checking several of the leading cases in the L.R.R.M. Reports, particularly the recent decision of the United States Supreme Court in San Diego Building Trades Union vs. Garmon, I was convinced that the NLRB was the only tribunal which had authority to resolve the matter. I therefore immediately prepared an unfair labor charge against the employes [sic] based upon a refusal to negotiate in view of the invalidity of the contract and forwarded it to the Cleveland office of the NRLB.

Shortly thereafter, at about 12:00 noon I received a call from the Court House to advise that Mr. Ragan had informed the Clerk's office of the Common Pleas Court that a suit of some nature would be filed immediately after lunch. After requesting that I be advised when such event occurred I continued to research the jurisdictional question and prepared a brief outline of our legal position.

At about 1:15 P. M., I received a call from the Court House to advise that an injunction suit had been filed against the I.L.A. and that the matter had been assigned to Judge McCabe. I immediately contacted Judge McCabe by phone, told him that Mr. Ragan was about to present him with an injunctive petition, that I represented the union and that I would be available for a hearing on the restrain-

[fol. 46] ing order upon a moment's notice. He replied "alright" or words of similar import. I thereupon reviewed my outline and waited his call.

"Between fifteen minutes to a half hour later I received a call from the court house to advise me that the injunction had been granted. I replied that this could not be possible and that certainly Judge McCabe would not take such action without a hearing particularly in view of my earlier call. The party calling me said that he would substantiate his information and upon doing so called me back to confirm the issuance of the order and to inform me that the Sheriff's office was preparing to serve the summons.

"I immediately started over to the court house, but after a second thought went to Smith's Cafeteria to see what my associate would suggest in view of the circumstances. Realizing that such an order could not be appealed we both went directly to the Court House to discuss the matter with Judge McCabe and to request an immediate hearing.

"I found Judge McCabe in Judge Macelwane's chambers and approached him as he was leaving to return to his own chambers. After some brief preliminary remarks he asked me what I wanted and I told him I would like to have a hearing on the issuance of the restraining order. He said definitely and flatly that I was not going to have a hearing, that Mr. Ragan had told him that everyone was happy with the contract and that some hoodlums from Detroit had come to Toledo and forced them to go back on strike and he wasn't going to let these outsiders come down here and push us around. I protested that these were not the facts and that the position of the union was that the persons who signed the agreement had no authority to do so and further suggested that the court had no jurisdiction. He [fol. 47] again said that I was not going to get a hearing on the matter and that he would make a little jurisdiction. I told him that I was entitled to an immediate hearing on the matter particularly in view of the question of jurisdiction and he replied that he did not have the time and that I would have to wait my turn. After some urging however he did say that if I could get Mr. Ragan to agree to a hearing on the issuance of the restraining order he would hear it that afternoon. Being somewhat puzzled at this sugges-

tion, and frustrated, I left the Judge's chambers in search of my associate who was attempting to locate this file. During my entire conversation with Judge McCabe, with the exception of our walk from Judge Macelwane's chambers, Judge McCabe occupied himself by reading a brief.

"I found my associate in the Clerk's office where he had found the petition and, upon examining it carefully, we determined to our complete satisfaction that the court did not have jurisdiction. Moreover it was our belief that the prayer of the petition did not pray for a restraining order but the practical effect was that of the issuance of a temporary injunction.

"We thereupon retired to Judge Straub's chambers and examined the statutes relevant to the issuance of injunctions and after assuring ourselves that a hearing was necessary before a temporary injunction could issue we both approached Judge McCabe and told him that we thought the petition erroneously prayed for a temporary injunction instead of a restraining order and that in that event we were certainly entitled to an immediate hearing. He replied that he did not read the petition very carefully and could not really say what it was all about but felt that he could take Mr. Ragan's word for the contents and again [fol. 48] said that he did not have time to set the matter down for hearing, neither now or in the near future. I asked him whether his offer was still open and if I contacted Mr. Ragan would he hear the matter immediately. He replied that he would and I called Mr. Ragan's office from Judge McCabe's office only to find that he was not in at the moment and could not be reached.

"Again a discussion began regarding the necessity of a hearing with my associate making most of the appeal. During the conversation Judge McCabe again said if we could get in touch with Mr. Ragan immediately he would not set it down for an early hearing and he would not give us any idea as to when he would do so. He again said that he was very busy and that other matters needed his attention, that he could not hear two matters at once and that the matter would simply have to wait until it came up for final hearing. At this point I suggested to the court that if he was too busy would he consent to another Judge hearing

the matter, whereupon he absolutely refused saying that the other Judges are busier than he is with two of them out of town fishing.

"During this same conversation he again said that the contract was signed by these men, that he believed that when men sign contracts it should be honored and that he was not going to have these hoodlums from Detroit coming down here and running our city. He pointed out that he was presently dealing with several other hoodlums from Detroit on criminal matters."

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"As our conversation neared its end, my associate told him that regardless of the private opinions of the court, respecting the validity of the contract that the court had [fol. 49] no jurisdiction over this matter and that he was forcing us to advice [sic] our clients,"— • • • "of their rights not to obey the order. Judge McCabe replied that in such an event that they would be cited for contempt."

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"After a great deal of urging Judge McCabe agreed to have his bailiff contact Mr. Ragan and request that he appear for a hearing to raise the jurisdictional matters involved. Inasmuch as Mr. Ragan was not in his office he assured us that he would contact me as soon as such a hearing could be arranged thereupon my associate and I returned to the office.

"By 4:00 P.M. not having heard from the court I called Judge McCabe's office to see if they had been able to contact Mr. Ragan. Judge McCabe said that they had contacted Mr. Ragan but that he was about to leave and did not intend to hold night court. I requested that he hear the matter on Saturday and he stated that he would not be in over the week end. I requested a hearing on Tuesday and he replied that he had a trial that day and further said that it looked like the rest of his week was filled.

"I then returned to my office and consulted with my associate regarding the day's events and we both concluded that Judge McCabe had no intention whatsoever of granting us a hearing unless he was absolutely forced to, and that even if we were allowed to argue the matter before

him it seemed doubtful that he would be inclined to recognize our jurisdictional argument.

"Operating on this conviction we consulted the Ohio authorities to affirm the position that an order made by a court in a matter over which it had no jurisdiction is absolutely void and therefore contempt proceedings could not issue thereon.

[fol. 50] "I thereupon called Mr. Friedman in Chicago and advised him as to the status of the matter. I explained to him that though it was possible to file a motion to vacate or a demurrer to the petition that it was apparent from the action of the court that such a motion would not be set down for hearing in the near future and that even if it were, an adverse ruling, which seemed most likely in view of the court's attitude, would not be a final order and could not be appealed. I then told him that if we were correct on the law that the order of the court was wholly invalid then the only alternative would be to defy the order of the court in the hopes that Mr. Ragan would file contempt proceedings which would undoubtedly be heard immediately and from which we could instantly appeal to the Court of Appeals to determine the jurisdiction of the court.

"Mr. Friedman said that he would have to take the matter up with the officials of the union and that he would contact me later in the evening. I immediately drove to the picket line to pick up a copy of the petition." • • •

By the way, it was not served on counsel, even though Mr. Ragan knew that respondent represented them.

"and while there attempted as best I could to explain the afternoon's proceedings. I further told them that I would contact them later after I heard from the officials of the union.

"At about 8:00 P.M. Friday evening I received a call from Mr. Friedman who advised me that the union officials had considered the matter in detail and had concluded that on the basis of my report to them that their only possible course was to continue the picketing. I thereupon called the union hall and told them of the decision of the officials and asked them to communicate this information to the pickets.

[fol. 51] "On Saturday the 28th day of May I was advised that Mr. Ragan attempted to file an affidavit in contempt but for reasons unknown to me, Judge Macelwane, who was on duty, refused to issue such proceedings and set the contempt matter for hearing at 9:00 A.M. on Tuesday, May 31st.

"Over the weekend I continued to study the jurisdictional question as well as related matters and prepared a motion to vacate the restraining order, a petition for removal and a petition for writ of habeas corpus. In addition I consulted at length with my associate and Mr. Friedman respecting all of these matters.

"At approximately 8:30 Tuesday, May 31st, I perfected the removal proceedings and appeared in Judge McCabe's court at the assigned hour.

"At 12:00 noon, Judge McCabe advised us in chambers that in as much as removal proceedings had been perfected he felt that we should take up the matter with the Federal District Court. Mr. Ragan and I left the Judges chambers and Mr. Ragan told me he intended to contact Judge Kloeb immediately after lunch to arrange for a conference regarding the removal proceedings.

"Around 2:00 P.M. on the 31st day of May, Mr. Ragan and I met in Judge Kloeb's chambers. Without deciding the question of the right of removal, Judge Kloeb stated that he felt I was attempting to remove the cause in an effort to avoid the order of the court and that he did not want to be a party to such an avoidance when there was an adequate right of appeal within the state court jurisdiction. Moreover he felt that the five judges of the state court would have more time to handle this matter than the single [fol. 52] judge of the District Court and finally indicated that he was about to leave on his vacation and did not want to become involved in a complicated and serious legal matter unless he absolutely had to."

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"In the course of the discussion however he did indicate that he would not have issued an injunction ex parte under any circumstances and further that he did not feel that his court had jurisdiction over the matter but that the juris-

diction was in the N.L.R.B. pursuant to the Taft-Hartley Act.

"Sensing the disposition of the court toward this matter, I agreed to consent to a remand to the State Court and Mr. Ragan and I went immediately to Judge McCabe's chambers to discuss the entire matter."

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"Mr. Ragan opened the discussion and he and the Judge talked for some time during which conversation the court concluded that it did not intend to reform the contract. Feeling it necessary to advise the court of my position on the jurisdictional matter involved I interrupted the conversation and asked if I could say a few words, a request Judge McCabe graciously granted. I attempted to explain the matter to him pointing out that I was there only to object to the jurisdiction of the court and that my prime interest was to have the matter heard so that we could either appeal it or get it before the N.L.R.B. or get it where it belonged. Judge McCabe suggested that I was obsessed with this point and Mr. Ragan suggested that I file a motion to vacate the restraining order."

The Court: That's right.

[fol. 53] Mr. Green: "I thereupon told the Court that I had a motion to vacate prepared and would gladly file it immediately if I could obtain an early hearing. The court flatly refused saying that he would not hear the motion until the restraining order was obeyed. I then asked Judge McCabe that if the restraining order was obeyed would it be possible to obtain a hearing within the week and he replied that it would not.

"Mr. Ragan then suggested that as an alternative that I agree to submit to the court the four signators of the agreement to be dealt with on contempt. After some discussion I agreed to do so and stated to both Judge McCabe and Mr. Ragan that I would gladly stipulate all matters necessary to establish the contempt so that I could immediately appeal the decision or file habeas corpus proceedings.

"The entire atmosphere of the meeting was light and agreeable and I was convinced that both the Judge and Mr. Ragan were aware that I had consented to bring these

men before the court and stipulate the essential matters for the express purpose of testing the validity of the court's order and its jurisdiction over the subject matter. So far as I was concerned the matter was clear cut and the hearing the following day was to be short and to the point. To that end I prepared the necessary habeas corpus proceedings.

"The contempt proceedings of the first of June are a matter of court record. The following day I researched and prepared a petition for a writ of prohibition and presented it to the Court of Appeals at about 4:15, Thursday afternoon. I was advised by the court that my petition was filed [fol. 54] too late and they did not feel that they could issue an ex parte alternative writ. In addition however they offered the opinion that the writ would not lie even if it were filed because I had an adequate remedy at law to test the jurisdiction of the court upon the conviction in the contempt proceedings by way of habeas corpus or appeal. They also suggested that their recent decision in the Foodtown case resolved this matter."

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That concludes that part of what we—only that part of what we intend to offer by way of mitigation or purging, whichever the court wants to call it. It should be and it is important that the court know that the contract that was the basis of this lawsuit, on which the court based the failure of these fellows to live up to their agreement when he issued this injunction, that contract on its face shows two things, one, it is not a completed contract—well, that is one of the things that is before the court, number two, this matter, as the record shows, the petition shows, arises out of transactions and activity in interstate commerce. Mr. Ragan has stipulated or said into the record that this union has been certified by the N.L.R.B., so there can be no question about the interstate commerce acts or proceedings.

• • • • • • •

Now, the thing that you filed here yesterday—I don't know what you call it, I have forgotten the name of it—I don't mean any disrespect, you said charge in contempt?

The Court: "Charge in Contempt."

Mr. Green: It was under 2705.02, .03?

The Court: 2705.02, that's right.

[fol. 55] Mr. Green: Of the General Code. 2705.02 says: "A person guilty of any of the following acts may be punished as for contempt: (a)" —this is the only one of the things I think that should be applicable here,— "disobedience or resistance to a lawful writ, process, order, rule, judgment or conduct of a court or an officer."

So whether we want to get into the original question of jurisdiction, or not, a contempt proceeding can not lie under this provision of the Code, unless it has the first essential of being a lawful order.

• • • • • • •

Mr. Green: Now, necessarily and as a part of this whole proceeding the question here is whether or not the Court in the first instance was erroneously led into believing when it issued this order in chambers, that it in fact did have jurisdiction.

The record shows and I don't think there is any denial that this is a matter exclusively in interstate commerce; that it is within the jurisdiction of the N.L.R.A.; the union a certified agent, according to the plaintiff; there is now presently before the Board an unfair labor practice arising out of an alleged breach of this so called contract.

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Mr. Green: (continuing)—then I don't know what it coming to. I think we have that right and that's what we have done. All the circumstances arising before and leading up to the advice of this lawyer to his clients, if that is excluded, then I presume as the Court said, it has decided, then the only thing here today is the question of punishment.

The Court: That's right. At last, you have arrived at the conclusion. That's all that's before the Court.

• • • • • • •

[fol. 56] Mr. Green: This thing apparently in the last few minutes has come dangerously close to degenerating into an emotional thing and I would like to suggest this to the

Court, that before sentence is imposed that the Court will go back and read what is in the record and the new record—

The Court: I am not going to read all that.

Mr. Green: I was just going to make the suggestion.

The Court: You may make your suggestion.

The Court has previously held that Merritt W. Green II is in contempt of court, therefore he is ordered committed to the Lucas County jail for a period of ten days and to pay a fine of $500.00 and stand committed until the fine is paid.

That's all there is to it.

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(Hearing adjourned at 12:30 P.M.)

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY

TRANSCRIPT OF DOCKET ENTRIES

1960, June 7. Petition for writ of habeas corpus, filed.

1960, June 7. Writ of habeas corpus issued and delivered to sheriff. Ordered to appear and show cause at ten o'clock a.m. on Thursday, June 9th, 1960. Further that pending the hearing and determination of said cause said Merritt W. Green II, shall be released from custody upon giving bond in the sum of five hundred dollars with surety to the satisfaction of the clerk of this court.

1960, June 7. Recognizance of the accused, filed.

1960, June 8. Writ of habeas corpus returned, filed endorsed as follows, viz: Received a writ of which the fore-[fol. 57] going is a certified copy June 7th, 1960, at 3:10 o'clock p. m. and pursuant to its command on the seventh day of June, 1960 at 11:00 o'clock a.m., I made service thereof upon the said William Hirsch, sheriff of Lucas County, Ohio, by delivering to him personally, said original writ of habeas corpus. s/Paul Hohly, M.D., Coroner.

1960, June 8. Writ of habeas corpus returned from the sheriff, filed endorsed as follows, viz: To Honorable Judges of the Court of Appeals, Lucas County, Ohio. Received this writ seventh day of June, 1960, at .... o'clock ..... M. The said Merritt W. Green, II, was then in my custody

under and by virtue of a warrant of arrest issued by the Court of Common Pleas of Lucas County, Ohio, a true, correct and complete copy of which said warrant is as follows:

To the Sheriff of said County:

Whereas, at the April Term of said Court of Common Pleas, begun and held at Toledo, Ohio in said county, on the fourth day of April, 1960, the said Merritt Green, II, having been charged with contempt of court. It is therefore the sentence of the Court that he be imprisoned in the county jail for the term of (10) days and that he pay a fine of ($500.00) dollars and that said Merritt Green, II, is therefore ordered into the custody of the sheriff of this county, to remain confined in said county jail until the term of (10) days confinement expires and until said fine are paid, or secured to be paid, or until otherwise legally discharged. And he shall secure credit upon such fine at the rate of three dollars per day for each day's imprisonment. You are therefore, Hereby Commanded to proceed [fol. 58] to carry out and enforce said judgment and sentence of the Court, according to law.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Toledo, Ohio, this seventh day of June, 1960. (Signed) Francis A. Pietrykowski, Clerk.

In witness whereof, I have hereunto set my hand this eighth day of June A. D., 1960. s/William Hirsch, Sheriff of Lucas County, Ohio.

1960, June 9. Motion for leave for The Toledo Bar Association to intervene as amicus curiae, filed.

1960, June 17. Motion for leave for The Toledo Bar Association to intervene as amicus curiae, granted.

1960, June 27. Petitioner, the respondent and amicus curiae have leave to file their respective briefs by June 30, 1960 and the petitioner and respondent have leave to file reply briefs, if they so desire, by July 7, 1960.

1960, June 29. Brief of petitioner, filed in triplicate.

1960, June 29. Memorandum Re bail, filed in triplicate.

1960, June 30. Brief of amicus curiae, filed in triplicate.

1960, June 30. Proof of service, filed.

1960, July 7. Petitioner granted leave to file his brief or briefs in reply to briefs now filed in this cause, by July 14, 1960.

1960, July 14. Reply brief of petitioner, filed in triplicate.

1960, Nov. 1. Minutes, filed. Release upon petition for writ of habeas corpus denied, for reasons set forth in the per curiam opinion, costs assessed against petitioner. Exceptions saved.

[fol. 59] 1960, Nov. 1. Opinion, filed.

1960, Nov. 12. Court finds that Merritt W. Green, II, lawfully imprisoned by the sheriff of Lucas County, Ohio. Ordered that Merritt W. Green, II, be remanded to the custody of the said sheriff of Lucas County, Ohio, pursuant to the commitment as set forth in the return herein filed, and that he pay the costs of this proceeding. Exceptions saved.

1960, Nov. 18. Notice of appeal to the Supreme Court of Ohio, filed by petitioner. Said appeal is on questions of law.

1960, Nov. 21. Praecipe for transcript to the Supreme Court of Ohio, filed.

1960, Nov. 23. Stipulation, filed.

1960, Nov. 23. Petitioner's bill of exceptions, filed.

[fol. 60]

IN COURT OF APPEALS OF LUCAS COUNTY, OHIO

OPINION OF THE COURT OF APPEALS

Per Curiam:

This is an original action in habeas corpus filed in this Court on June 7th, 1960. The issuance of the writ of habeas corpus is the outgrowth of an action for an injunction had in a case then pending in the Court of Common Pleas of Lucas County, wherein the Toledo Marine Terminals, Inc., was plaintiff, and various members of the International Longshoremen's Association, a labor organization, were defendants. The record discloses the following pertinent facts in the above styled action: an injunction was sought to enjoin the defendants, among other things, from

picketing in any manner the premises of the plaintiff as set forth in the petition. Upon the filing of this petition a temporary restraining order was allowed by the Court as prayed for and bond was set and furnished. In defiance of this restraining order defendants continued with the picketing of plaintiff's premises. As a result of such violation of the restraining order four members of the Longshoremen's Association were cited for contempt of court. A hearing on said contempt charges was held before the Honorable John M. McCabe, Judge of the Court of Common Pleas on June 1st and June 3rd, 1960. The petitioner seeking release by habeas corpus is an attorney at law and appeared as the attorney for the Longshoremen Association in the action out of which the present action grows; that he also appeared as attorney for the four pickets charged with contempt of court at the hearing on June 1st and June 3rd. At this hearing the petitioner in this habeas corpus action was asked—

> [fol. 61] "The Court: I want them to explain to me why they violated the order of this Court.
>
> Mr. Green: I can—.
>
> The Court: I want them to tell me whether they just did that or whether they were told by someone to do that, I want to know.
>
> Mr. Green: I can advice [sic] the Court now that they were told by me."

Upon his admission that he had advised members of the union to continue the picketing of plaintiff's premises in violation of the Court's restraining order the Court found Mr. Green was in contempt of court and he was given until the following Tuesday, June 7th, to purge himself of contempt.

On June 6th the Court filed a written charge against the respondent charging him with contempt of court and set the hearing on said charge for June 7th at 10:30 a. m. At this hearing the respondent appeared, also his counsel, Mr. Merritt W. Green and Mr. Robert Burns, who stated that they were in court pursuant to the order issued to the respondent to appear with counsel to purge himself

of contempt of court. Counsel thereupon stated to the court that they were taking the position that the court was without jurisdiction of the subject matter, in the action in which the restraining order was issued. During the hearing on June 7th counsel admitted that the respondent advised the members of the union to violate the restraining order issued by the court. See Record, Page 43.

Three legal questions are presented—

First: Did the Court have jurisdiction to issue the restraining order which is the basis of this contempt action?

[fol. 62] Second: Did the action of the respondent in advising the violation of the restraining order constitute a contempt of court?

Third: In the hearing upon the written charge against the respondent for contempt of court was due process of law accorded the respondent?

It is the contention of the petitioner that the Common Pleas Court did not have jurisdiction of the subject matter in the original action to issue the restraining order or restrain the picketing of the plaintiff's property, that the subject matter involved was within the exclusive jurisdiction of the National Labor Relations Board. The right of the state Court in the original action to retain jurisdiction and on final hearing to issue an injunction is not raised by this proceeding, and is not decided by the Court. The question involved in this habeas corpus action is the jurisdiction of the state Court to issue the temporary restraining order to preserve existing conditions until such time as the Court could pass upon the question of its jurisdiction. We believe that this question is fully and definitely settled by the decisions of the United States Supreme Court.

In the case of United States of America v. John F. Shipp, et al., 203 U. S. 563, 27 Supreme Court Reporter, it is stated on page 166,—

> "But even if the circuit court had no jurisdiction to entertain Johnson's petition, and if this court had no jurisdiction of the appeal, this court, and this court alone, could decide that such was the law. It and it

alone necessarily had jurisdiction to decide whether the case was properly before it. On that question, at least, it was its duty to permit argument, and to take the time required for such consideration as it might need. Until its judgment declining jurisdiction should [fol. 63] be announced, it had authority, from the necessity of the case, to make orders to preserve the existing conditions and the subject of the petition, just as the state court was bound to refrain from further proceedings until the same time".

We find in the first headnote of this case the rule stated as follows:

"1. Lack of jurisdiction in the Federal circuit court of a petition for habeas corpus, or in the Supreme Court of the appeal from the order denying the writ, does not enable persons to disregard, without liability to process for contempt, the order of the Supreme Court, that 'all proceedings against the appellant be stayed, and the custody of said appellant be retained pending this appeal,' since that court necessarily has jurisdiction to decide whether the case is properly before it".

The rule as laid down in United States v. Shipp, supra, is followed in Carter v. United States, 135th Federal 2d, 858. In that case the violation of the temporary restraining order was held punishable as criminal contempt pending a decision on the doubtful question of its jurisdiction. The district court was held to have jurisdiction to maintain a status quo by issuing a temporary restraining order and punish a violation of such order as contempt.

The law as stated in the case of United States v. Shipp, supra, was followed by the Supreme Court in a case of United States vs. United Mine Workers of America, 330 U. S., 258. The Court held in the later case that where the district court issued a restraining order to preserve existing conditions pending a decision of its authority to grant injunctive relief in a government suit the defendant's disobedience of the restraining order was punishable as a criminal contempt.

[fol. 64] It is the holding of this Court that the Court of Common Pleas had jurisdiction to issue the temporary restraining order restraining picketing of plaintiff's premises.

The second question confronting the Court is whether the act of the petitioner constitutes a criminal contempt. It is recognized that the question here involved is of the utmost importance to both the Courts and the members of the Bar. In re Watts, 190 U. S. 1, 23 Supreme Court Reporter at page 725, Chief Justice Fuller states the rule "in the ordinary case of advice to clients, if an attorney acts in good faith and in the honest belief that his advice is well founded and in the just interests of his client, he cannot be held liable for error in judgment. The preservation of the independence of the Bar is too vital to the due administration of justice to allow of the application of any other general rule".

It will not be questioned that the petitioner was fully within his rights to advise his clients that in his opinion the Common Pleas Court did not have jurisdiction to issue the restraining order and to point out to his clients the legal remedies open to them to raise the question of jurisdiction. When the petitioner went beyond advising his clients as to their legal rights and that the order of the Common Pleas Court in his opinion was invalid and advised them to violate the Court's order, his actions in so advising them ceased to be privileged and he acted at his peril. The act of advising the violation of the Court's order in and of itself constitutes contempt regardless of the good faith or bad faith of the petitioner. The record reveals that the petitioner admitted in open Court that he advised his clients to violate the Court's restraining order. The gist of petitioner's offense was not in advising his clients that [fol. 65] the Court was without jurisdiction to issue the restraining order and therefore the order was invalid, but when he proceeds further and without filing any motion or pleading of any kind to test the jurisdiction of the Court advising his clients to ignore the Court's order. This is not a case where the attorney gives wrong advice on a legal proposition. Whether his opinion regarding the Court's jurisdiction was correct or incorrect his duty was to advise

his clients to obey the order and to follow his legal remedies to test such jurisdiction.

In the instant case the conduct of the petitioner was clearly an obstruction to the due administration of justice and therefore the question of his good faith in advising a violation of the restraining order has no application.

The final question to be passed upon by the Court, is whether or not at the hearing on the written charges filed against the petitioner he was denied due process of law. Before discussing the question involved let it be said that this Court does not approve of the manner in which the hearing in the trial court was had. The wrangling appearing in the record which took place between counsel for the petitioner and the court should not be found in an orderly judicial proceeding. However, the duty of this Court is to sift the evidence appearing in the record to see if due process had been afforded the petitioner and to determine whether any rights of the petitioner have been violated to his prejudice. In both the decisions of the United States Supreme Court and the Supreme Court of Ohio it is stated that due process of law involves only the essential rights of notice, hearing or the opportunity to be heard before a competent tribunal. McKane vs. Durstoon, 153 U. S., 684, [fol. 66] 14 Supreme Court Reporter 913, State vs. Edwards, 157 O. S., 175, Luff vs. State, 117 O. S., 102.

R. C. Sec. 2705.01 provides that a Court or Judge at chambers may summarily punish a person guilty of misconduct in the presence of or so near the Court or Judge as to obstruct the administration of justice.

It would appear that when the petitioner, an officer of the Court, stated in open Court on June 1st and June 3rd that he advised the pickets to continue their picketing and disobey the restraining order his acts constituted contempt, "in the presence of or so near the Court as to obstruct the administration of justice". Under such facts it was not necessary to file written charges. However, whether necessary or not, written charges were filed under R. C. Sec. 2705.03 for contempt of court as set forth in subsection A of R. C. Sec. 2705.02 and a hearing was had on said written charges on June 7th.

The trial court before whom the contempt proceedings was had was also the trial Judge who issued the temporary restraining order which was violated and also the trial court conducting the hearing on June 1st and June 3rd of the pickets charged with contempt. This being true, in the hearing held on June 7th the Judge could take judicial notice of all that transpired in the preceding hearings which were the outgrowth of the injunction action then pending before him. In the hearing on June 7th the court could take judicial notice of the fact that the temporary restraining order restraining picketing was issued; that the restraining order so issued was violated by the continuing of picketing after the restraining order was issued and after those violating the order had notice of the order; that the petitioner as attorney for the respondent at the [fol. 67] hearing on June 1st and June 3rd admitted advising them to violate the restraining order.

While there appears in the record contradictory statements of the purpose of the hearing had on June 7th and at times it would appear that the court and counsel were apparently confused and differed as to the matters being discussed, this Court is of the opinion that there appears in the record admissions of guilt of the petitioner in advising his clients to violate the restraining order. This admission of guilt was made by the petitioner at the hearing on June 1st and June 3rd and admission of his guilt in advising the violating of the restraining order was made by his counsel at the hearing on June 7th. The record does not show the petitioner was denied the opportunity to be sworn and to testify; that his counsel read into the record a complete and detailed statement of what the petitioner would testify to if sworn and testified as a witness. Various parts of this statement made by petitioner's counsel were discussed during the presentation by both petitioner's counsel and the court. The Court find that the petitioner was not denied due process of law at the hearing on June 7th and that there was evidence produced at the hearing of June 1st and June 3rd and also June 7th which supported the finding of the trial court that the petitioner was guilty of contempt of court. Consideration of the evidence produced prior to the filing of written charges was within the

sound discretion of the trial court and was not prejudicial to the petitioner. See North American vs. United Automobile, etc., 69 O. L. A. 242, 124 N. E. (2nd) 822.

The Court therefore find that the petitioner has failed in his proof that he is being unlawfully restrained of his liberty. Judgment accordingly.

Middleton, J. and Guernsey, J. concur.

[fol. 68] YOUNGER, P.J. dissents.

It is admitted by all parties here that the plaintiff in the case in which this contempt proceeding arises, The Toledo Marine Terminal, Inc., is engaged in interstate commerce and that the picketing by the defendant members of the International Longshoremen's Association was entirely peaceful and nonviolent.

The Supreme Court of Ohio in Grimes & Hauer vs. Pollock, 163 O. S. 372, has held:—

> "Because of the decision of the Supreme Court of the United States in the case of Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776, 346 U. S., 485, where a labor union is in dispute with an employer engaged in interstate commerce over the unionization of the employer's nonunion employees, and the union pickets the business locations of such employer in an orderly and peaceful manner, a state court is without jurisdiction to enjoin the picketing; a controversy of this kind comes within the provisions of the Labor Management Relations Act (Section 151 et seq., Title 29, U. S. Code), as it relates to unfair labor practices; and the employer must, initially at least, pursue the remedy of presenting his grievance to the National Labor Relations Board".

Also in Richman Brothers Co. vs. Amalgamated Clothing Workers of America, et al., 168 O. S. 560, the Supreme Court held:—

> "Where interstate commerce is involved and a labor union, through its members who are not former or present employees of an employer, engages in nonviolent picketing of such employer's premises to in-

duce the unionization of his employees, the National Labor Relations Act (Section 141 et seq., Title 29, U. S. Code, as amended) has exclusive application, and, by decisions of the Supreme Court of the United [fol. 69] States interpreting such act, state courts lack the power and jurisdiction to intervene",

The Court of Appeals of Lucas County in December, 1959, in Sherlock Baking Company vs. Bakery Drivers Union Local (unreported) held to the same effect.

In view of the above cases and the decisions of the Supreme Court of the United States upon which they are based, the petitioner, Merritt W. Green II, had a valid legal foundation for his opinion that the Common Pleas Court had no jurisdiction of the subject matter and had a valid arguable issue on the question as to whether or not the restraining order involved herein was void. It was his duty as a lawyer therefore, in my opinion, to so advise the head of the Longshoremen's Union in Chicago and its general counsel in Chicago and such of the individual defendants as might ask him concerning the same.

The record in this matter from its beginning to its end is such that neither the petitioner, his attorneys, nor the trial court have any reason to be proud. It shows a developing clash of personalities, much argument over unimportant or irrelevant matters, a complete forgetting of the main issue and a run away on a tangent. However, there is practically no controversy or dispute over the main facts, and no denial at all over what I consider to be the controlling facts.

As I read this record the decision of the union to continue picketing was made by the top officials and general counsel in Chicago. At Page 35 of the June 7th hearing Mr. Green stated as follows:

"At about 8:00 P. M. Friday evening I received a call from Mr. Friedman who advised me that the union officials had considered the matter in detail and had [fol. 70] concluded that on the basis of my report to them that their only possible course was to continue the picketing. I thereupon called the union hall and told

them of the decision of the officials and asked them to communicate this information to the pickets.

However it is true that at the hearing before Judge McCabe, in the midst of an exciting hearing and considerable confusion, and in an effort to get down to the business at hand—that of dealing with the contempt of the four pickets which he had voluntarily brought into court—Mr. Green did, big-heartedly and, in my opinion, contrary to the record, assume such responsibility.

The acceptance of this responsibility was a direct result of a conference and a firm agreement reached in Judge McCabe's office on May 31st between Mr. Green, Mr. Ragan (the opposing counsel) and Judge McCabe, as set forth by the following on pages 37-39 of the June 7th hearing and which is not denied:

"Mr. Ragan opened the discussion and he and the Judge talked for some time during which conversation the court concluded that it did not intend to reform the contract. Feeling it necessary to advise the court of my position on the jurisdictional matter involved I interrupted the conversation and asked if I could say a few words, a request Judge McCabe graciously granted. I attempted to explain the matter to him pointing out that I was there only to object to the jurisdiction of the court and that my prime interest was to have the matter heard so that we could either appeal it to get it before the N.L.R.B. or get it where it belonged. Judge McCabe suggested that I was ob- [fol. 71] sessed with this point and Mr. Ragan suggested that I file a motion to vacate the restraining order."

The Court: That's right.

Mr. Green: "I thereupon told the Court that I had a motion to vacate prepared and would gladly file it immediately if I could obtain an early hearing. The court flatly refused saying that he would not hear the motion until the restraining order was obeyed. I then asked Judge McCabe that if the restraining order was

obeyed would it be possible to obtain a hearing within the week and he replied that it would not.

"Mr. Ragan then suggested that as an alternative that I agree to submit to the court the four signators of the agreement to be dealt with on contempt. After some discussion I agreed to do so and stated to both Judge McCabe and Mr. Ragan that I would gladly stipulate all matters necessary to establish the contempt so that I could immediately appeal the decision or file habeas corpus proceedings. (Emphasis added.)

"The entire atmosphere of the meeting was light and agreeable and I was convinced that both the Judge and Mr. Ragan were aware that I had consented to bring these men before the court and stipulate the essential matters for the express purpose of testing the validity of the Court's order and its jurisdiction over the subject matter. So far as I was concerned the matter was clear cut and the hearing the following day was to be short and to the point. To that end I prepared the necessary habeas corpus proceedings."

The following day, June 1st, all of the above parties appeared in court as agreed upon and the petitioner was [fol. 72] accompanied by the four pickets he had agreed to produce. However, the hearing deteriorated into a wrangle as to the court's jurisdiction to issue the restraining order, the propriety of the court's refusal to grant a hearing to the defendants either before or after issuing the order, the failure to file a motion to dissolve the restraining order and many other matters, notwithstanding the business at hand was the alleged contempt of the four defendants as agreed upon the day before.

The record does show however that at one point Mr. Green addressed the court as follows:

"Mr. Green: You are sure you could not cite them for contempt now, Your Honor! The only thing I want here is that these parties may be thrown in jail and get them out on habeas corpus."

An adjournment was taken to Friday, June 3rd, when evidence was submitted showing that the picketing was

still continuing but no finding was made as to the guilt or innocence of the four defendants. In fact they were completely forgotten and the petitioner as their attorney was then charged with contempt and the matter adjourned to June 7th.

It was never established by any evidence whether the four pickets acted upon the advice of the petitioner Mr. Green, the top officials of the union in Chicago, the general counsel in Chicago, or any one else.

The real reason why these four defendants were not sentenced and sent to jail so that the whole thing could be tested by habeas corpus as agreed upon the day before remains, to me, a mystery.

[fol. 73] In my opinion there is a vast distinction between the actions of an attorney who is openly contumacious or rebellious over an order of Court and advises or aids and abets his client in disobeying it and the actions of an attorney who has valid legal ground for believing the order of the Court to be void for lack of jurisdiction and advises his client to resist the order, so that, in the orderly administration of justice, the question of the Court's jurisdiction may be determined. This is especially so, where, as in this case, the opposing counsel and the Court know what is being done and the reason for it. I would not condone the one and I can not condemn the other.

I can not conscientiously vote to find the petitioner guilty of contempt under these circumstances and I therefore dissent.

[fol. 74]

IN COURT OF APPEALS OF LUCAS COUNTY, OHIO

(SIXTH APPELLATE DISTRICT)

No. 5338

In the Matter of the Petition for a Writ of Habeas Corpus for Merritt W. Green II

NOTICE OF APPEAL

The Petitioner hereby gives notice of appeal to the Supreme Court from a judgment rendered by the Court of Appeals of Lucas County in the above entitled cause, which judgment was journalized on the records of this Court on the 12th day of November, 1960. Said appeal is on questions of law. The appeal is to be taken to the Supreme Court of Ohio in a case originating in the Court of Appeals, Sixth Appellate District.

Merritt W. Green, Of Counsel

[fol. 75]

IN THE SUPREME COURT OF OHIO

Case No. 36830

In the Matter of the Petition for a Writ of Habeas Corpus for Merritt W. Green II.

Appeal from the Court of Appeals of Lucas County

Attorneys:

Merritt W. Green, 400 Security Bldg., Fred A. Smith, 707 Toledo Trust Bldg., Robert A. Burns, 5403 Summit Street, Toledo, Ohio; Irving M. Friedman, 7 So. Dearborn, Chicago, Illinois.

Harry Friberg, Prosecuting Attorney, Ben Neidlinger, Asst. Pros. Attorney, Court House, Robert Ragan, 1111 Edison Bldg., Toledo, Ohio.

MEMORANDA OF PLEADINGS, &C., FILED, WRITS ISSUED, &C., JUDGMENTS, ORDERS AND DECREES

November 25, 1960	Notice of Appeal filed.
November 29, 1960	Leave granted to file Court of Appeals Transcript of Docket and Journal Entries, Original Papers and Transcript of Testimony instanter. /s/ Carl V. Weygandt, Chief Justice. Journal 43, Page 657.
November 29, 1960	Court of Appeals Transcript of Docket and Journal Entries, Original Papers and Transcript of Testimony filed.
November 29, 1960	Cause docketed.
December 2, 1960	Papers taken by Rodenfels. 1/18/61 Returned.
December 30, 1960	Entry extending time for filing printed record to January 28, 1961. /s/ Carl V. Weygandt, Chief Justice. Journal 44, page 1.
[fol. 76]	
January 17, 1961	Printed Record and Certificate of Service filed.
February 1, 1961	Printers receipted bill filed.
February 6, 1961	Entry extending time for filing appellant's brief to February 16, 1961. /s/ Carl V. Weygandt, Chief Justice. Journal 44, page 63.
February 15, 1961	Appellant's printed brief and certificate of service filed.
March 13, 1961	Appellee's typewritten brief and certificate of service filed.
March 30, 1961	Appellant's reply brief filed.
May 17, 1961	Judgment affirmed. Journal 44, page 206.

[fol. 77]

JOURNAL ENTRIES

Journal 43, Page 657
Entry

Leave is hereby granted to file Court of Appeals Transcript, Original Papers and Transcript of Testimony instanter. /s/ Carl V. Weygandt, Chief Justice.

Journal 44, Page 1
Entry

On request of printer, and for good cause shown, it is ordered that the time for filing printed record is extended to January 28, 1961. /s/ Carl V. Weygandt, Chief Justice.

Journal 44, Page 63
Entry

On request of printer and for good cause shown, it is ordered that the time for filing appellant's brief on the merits is extended to February 16, 1961. /s/ Carl V. Weygandt, Chief Justice.

Journal 44, Page 206
Appeal from the Court of Appeals of Lucas County.

This cause came on to be heard upon the transcript of the record of the Court of Appeals of Lucas County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Court of Appeals be, and the same is hereby, affirmed; and it appearing to the Court that there were reasonable grounds for this appeal it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended taxed at $.....

Ordered, That a special mandate be sent to the Court of Appeals of Lucas County, to carry this Judgment into execution.

[fol. 78]

IN THE SUPREME COURT OF OHIO

IN THE MATTER OF THE PETITION FOR A WRIT OF HABEAS CORPUS FOR GREEN.

OPINION—May 10, 1961

Contempt of court—Restraining order in an action issued against a party—Violation of such order by party on advice of his counsel—Claim court lacked jurisdiction—Counsel guilty of contempt, when.

1. The term, "contempt of court," embraces a despising of the authority, justice or dignity of a court, and one is guilty of such contempt whose conduct is such as tends to bring the administration of the law into disrepute and disregard or otherwise tends to impede, embarrass or obstruct the court in the performance of its functions.

2. Ordinarily, the Court of Common Pleas, a court of general jurisdiction, is competent to determine its own jurisdiction over the subject matter and parties in an action instituted therein and should be accorded fair opportunity to do so.

3. Affected persons having notice of a temporary restraining order forbidding the doing of certain acts alleged to be unlawful, which order is issued on a verified petition by the Court of Common Pleas, must obey the same until such order is set aside by orderly judicial process, and an attorney at law who deliberately advises his clients against whom the order is directed to disobey and disregard it, which they do upon such advice, is [fol. 79] guilty of contempt of court and may be punished therefor.

(No. 36830—Decided May 17, 1961.)

Appeal from the Court of Appeals for Lucas County.

This cause originated in the Court of Appeals for Lucas County upon the filing of a petition in habeas corpus on behalf of Merritt W. Green, II, a Toledo attorney. The petition is grounded on the claim that Green is (constructively)

imprisoned and restrained of his liberty in the county jail of Lucas County without legal authority.

Previously, a written charge of contempt of court had been lodged against Green under the provisions of Sections 2705.02 and 2705.03, Revised Code, by a judge of the Court of Common Pleas of Lucas County in a case pending in that court, numbered 188631 and entitled Toledo Marine Terminals, Inc., v. International Longshoremen's Assn., AFL-CIO, Local 1317-A, wherein the court granted an order restraining and enjoining the defendants and persons associated with them from committing certain acts involving the picketing of the plaintiff's premises in Toledo and interfering with its business operations. Such charge alleged that Green, legal counsel for defendants, with full knowledge of the restraining order did order and advise the defendants to disobey the same, and that the defendants, acting upon such counsel and advice, did so. Such charge further alleged that Green, after being notified in open court by the judge that he was in contempt of court, did and does continue to advise defendants to continue to disobey such order of the court. Green was then formally and specifically charged with being in contempt of court and a hearing was set for Tuesday morning, June 7, 1960.

Such hearing took place as scheduled, and Green was found guilty, sentenced to serve 10 days in the county jail and fined $500. The present action in habeas corpus followed. Upon the hearing before it, the Court of Appeals decided, by a two-to-one vote, against Green and found that he was not being unlawfully restrained of his liberty.

An appeal as of right brings the cause here for review. [fol. 80] Mr. Fred A. Smith, Mr. Robert A. Burns, Mr. Merritt W. Green and Mr. Irving A. Friedman, for appellant.

Mr. Harry Friberg, prosecuting attorney, and Mr. Ben Neidlinger, for appellee.

ZIMMERMAN, J.

Seeking a reversal of the judgment of the Court of Appeals, Green, hereinafter referred to as appellant, makes three principal contentions: (1) That the Court of Com-

mon Pleas in the case instituted in that court was without jurisdiction to issue the restraining order described since the controversy was exclusively within the jurisdiction of the National Labor Relations Board under the National Labor Management Relations Act of 1947 (Section 141 *et seq.*, Title 29, U. S. Code), and hence a contempt proceeding based on any violation by appellant of such restraining order was a nullity; (2) that advice given by appellant to his clients relating to the disobedience of such order was within appellant's rights and duties as an attorney and did not represent contempt of court; and (3) that appellant was denied due process of law in the hearing of the contempt charge against him.

In the original verified petition filed in the Court of Common Pleas, plaintiff, Toledo Marine Terminals, Inc., alleged that at the time of filing the petition no labor dispute existed between it and the defendant association; that a labor contract binding on both plaintiff and defendant association had been signed on May 26, 1960 (effective until April 1, 1961); that on the day of the filing of the petition, viz., May 27, 1960, the defendant association began picketing at the entrance to plaintiff's property in direct violation of such labor contract which provided, *inter alia,* that "there shall be no stoppage of work caused by lockouts, walkout, sit-down, or slow-up of any kind or nature whatsoever, during the term of this agreement"; that the conduct of the defendant association in picketing plaintiff's premises and calling a strike are illegal acts; that a continuation of the same, unless enjoined, will result in damage to the life and limb of plaintiff's employees and irreparable loss to plaintiff's property; and that such conduct has created a serious emergency of such a nature as to require the issuance forthwith of a temporary restraining order. [fol. 81] In such petition, plaintiff prayed as follows:

"Wherefore, plaintiff prays that pending final hearing and determination of the issues herein, a restraining order be issued forthwith against the defendants and each of them, their officers, agents, members and other persons associated with and acting in concert with the defendants, and all others to whom knowledge of this order should come, restraining and enjoining them • • • ."

Then followed a description of the acts sought to be enjoined in relation to the picketing of plaintiff's premises and other interferences with its operations.

On the same day, viz., May 27, 1960, the court issued the restraining order as prayed for. At a hearing held on June 1 and 3, 1960, on charges of contempt brought against certain of those connected with the defendant association who were alleged to have disobeyed the court's restraining order, and again on June 7, 1960, at the hearing of the charge of contempt against appellant, the evidence established that appellant deliberately advised his clients to disobey the court's restraining order. During the hearing on June 1 and 3 the following took place:

"The Court: I want to know from them [those charged with contempt] before that can be done [an appeal], give them an opportunity to purge themselves. • • • I want them to explain to me why they violated the order of the court. • • • I want them to tell me whether they just did that or whether they were told by some one to do that; I want to know.

"Mr. Green [appellant herein]: I can advise the court now that they were told by me.

"• • •

"The Court: • • • The opportunity is always given, of course, to any one who has violated an order of the court, to purge themselves if they choose to do so; so I think they [the ones charged with contempt] should be called upon; well, I don't know whether they are represented by any one or not.

"• • •

"Mr. Green [appellant herein]: They are represented.

"The Court: By an attorney?

"Mr. Green: They haven't taken my license away yet. [fol. 82] "The Court: Well, what do you propose to do?

"Mr. Green: If the court please, assuming they are resting, I propose to rest also, Your Honor. We are really here in a criminal proceeding and my clients are not required to testify in such a general action, they are not required—

"The Court: You also advised them to violate an order of the court, too.

"Mr. Green: I did."

At the contempt hearing on June 7, 1960, Merritt W. Green, appellant's associate in the law practice and one of his attorneys, read from a written statement prepared by appellant and containing the language, "that regardless of the private opinions of the court respecting the validity of the contract that the court had no jurisdiction over this matter and that he was forcing us to advise our clients • • • of their rights not to obey the order."

In its broad sense, a contempt is a disregard of, or disobedience to, the order or command of a public authority, legislative or judicial. In its restricted and more usual sense, contempt comprehends a despising of the authority, justice or dignity of a court; and one is guilty of contempt whose conduct is such as tends to bring the administration of the law into disrespect and disregard or otherwise tends to impede, embarrass or obstruct the court in the performance of its functions. 11 Ohio Jurisprudence (2d), 90, Section 2; 12 American Jurisprudence, 389, Section 2.

This statement is applicable with particular force to an attorney at law. An individual against whom an order of a court is directed may violate such order and properly urge in his defense in a contempt proceeding that the order is void. But does not an attorney stand in a somewhat different position? He is an officer and arm of the court and as such has a duty to recognize and uphold the orders of the court as long as such orders stand. Consequently, an attorney who brashly advises his client to disobey an existing court order is in contempt of court notwithstanding any vulnerability that may attach to such order.

But aside from such observations, on its face the petition filed in the Court of Common Pleas by the Toledo [fol. 83] Marine Terminals, Inc., against the International Longshoremen's Association and others, does not disclose that the court lacked jurisdiction to entertain the same. The restraining order issued on the petition was preliminary and temporary in nature and *no motion was filed to dissolve it nor was any other instrument interposed challenging the court's jurisdiction.* Usually and in the first instance, a court of general jurisdiction, such as the Court of Common Pleas, is competent to determine its own jurisdiction (14 Ohio Jurisprudence [2d], 517, Section 100) and should

be accorded fair opportunity to do so. It appears to us that appellant assumed too much too soon in deciding for himself that the court was without jurisdiction and in advising his clients to act on his decision in defiance of the court's order.

It is to be noted that the petition filed in the Court of Common Pleas on which the restraining order was based alleged the imminence of violence in connection with the picketing of plaintiff's premises. Even in labor disputes where the federal labor relations statutes are applicable and exclusive, the Supreme Court of the United States has held that state courts possess the authority to intervene to enjoin mass picketing or picketing accompanied by violence and intimidation. Annotation, 2 L. Ed. (2d), 1636.

The Supreme Court of the United States has also said that a court possesses the power to determine its own jurisdiction, that a temporary restraining order issued by the court must be obeyed regardless of the final jurisdictional determination, and that one who disobeys such an order does so at his peril and may be amenable to criminal proceedings in contempt. *United States* v. *Shipp,* 203 U. S., 563, 51 L. Ed., 319, 27 S. Ct., 165, 8 Ann. Cas., 265; *United States* v. *United Mine Workers of America,* 330 U. S., 258, 91 L. Ed., 884, 67 S. Ct., 677.

Or stating it a little differently, affected persons having notice of a restraining order issued on a verified petition or complaint by a court of general jurisdiction must obey the order until it is set aside by orderly judicial process, and deliberate disobedience of such an order while it is in force subjects the violators to contempt proceedings. See *Howatt* v. *Kansas,* 258 U. S., 181, 189, 66 L. Ed., 550, 559, 42 S. Ct., 277, 280; *Smotherman* v. *United States* [fol. 84] (C. C. A.—10), 186 F. (2d), 676; *In re Lord,* 255 Minn., 370, 377, 97 N. W. (2d), 287, 292; and *Aladdin Industries, Inc.* v. *Associated Transport, Inc.* (Tenn. App.), 323 S. W. (2d), 222, 228, certiorari denied, 361 U. S., 865, 4 L. Ed. (2d), 104, 80 S. Ct., 117.

We are, therefore, of the opinion that the Court of Common Pleas possessed the authority to cite appellant for contempt, and that, on proof thereof, punishment was imposable.

There is no denying that appellant possessed the right to advise his clients that in his opinion the Court of Common Pleas was without jurisdiction of the cause and acted beyond its powers in issuing the restraining order, but when he went further and told them to disobey the order, which they did, he laid himself open to the contempt charge.

As to the hearing had on such charge on June 7, 1960, it was not conducted with the decorum and restraint it should have been, but to say it was of such a character as to deny appellant due process of law is hardly justified. The contempt had already occurred as disclosed in the hearing on June 1 and 3, and the judge presiding over that hearing was the same judge who issued the restraining order and who conducted the proceedings on June 7.

We deplore an unfortunate situation of this kind and the acrimony which apparently developed between the judge and the appellant, but we find no sufficient reasons to reverse the judgment of the Court of Appeals. Therefore, that judgment is affirmed.

Judgment affirmed.

WEYGANDT, C.J., MATTHIAS, RADCLIFF and O'NEILL, JJ., concur.

TAFT and BELL, JJ., dissent.

RADCLIFF, J., of the Fourth Appellate District, sitting by designation in the place and stead of HERBERT, J.

BELL, J., dissenting:

I am in complete agreement with the statements in the majority opinion as to what constitutes contempt of court, and I certainly concur in the observation that the acrimony [fol. 85] which developed between the judge and the attorney was unfortunate. A tendency toward an apologetic attitude on the part of both might well have avoided the unfortunate circumstances which resulted in this litigation.

But my interpretation of certain portions of the record herein forces me to a conclusion different from that of the majority of the court. In my opinion there is a sufficient basis in the holdings of this court to justify the opinion

of the attorney that the Common Pleas Court had no jurisdiction of the subject matter. *Grimes & Hauer, Inc.*, v. *Pollock*, 163 Ohio St., 372; *Richman Brothers Co.* v. *Amalgamated Clothing Workers of America*, 168 Ohio St., 560. Convinced that he had, at least, an arguable issue on the question of the validity of the restraining order, it was his duty as a lawyer to so advise his clients.

The record indicates that, on the day *prior* to the first contempt hearing (the hearing at which the attorney and his clients were found guilty of contempt although no citation in contempt had then been issued for the attorney), the attorney, *at the suggestion of his opposing counsel and with the full knowledge of the court*, agreed to submit to the court his clients to be dealt with on contempt. At that time he stated that he "would gladly stipulate all matters necessary to establish the contempt so that I could immediately appeal the decision or file habeas corpus proceedings."

To subsequently hold him in contempt for actually doing what, with the knowledge of the court and opposing counsel, he had agreed to do appears to me to be carrying the processes of contempt to an end that is unwarranted in this situation.

Judge Younger, in his dissenting opinion in the Court of Appeals summed it up thus:

"In my opinion there is a vast distinction between the actions of an attorney who is openly contumacious or rebellious over an order of court and advises or aids and abets his client in disobeying it and the actions of an attorney who has valid legal grounds for believing the order of the court to be void for lack of jurisdiction and advises his client to resist the order, so that, in the orderly administration of justice, the question of the court's jurisdiction may be determined. This is especially so, where, as in this case, the opposing counsel and the court know what is [fol. 86] being done and the reason for it. I would not condone the one and I can not condemn the other."

TAFT, J., concurs in the foregoing dissenting opinion.

[fol. 87] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 88]

SUPREME COURT OF THE UNITED STATES

No. 312, October Term, 1961

In the Matter of the Petition for a Writ of Habeas Corpus for MERRITT W. GREEN, II, Petitioner.

ORDER ALLOWING CERTIORARI—November 6, 1961

The petition herein for a writ of certiorari to the Supreme Court of the State of Ohio is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT, U. S.
AUG 14 1961
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 312

IN THE MATTER OF THE PETITION FOR A WRIT OF HABEAS CORPUS FOR MERRITT W. GREEN II,

MERRITT W. GREEN II,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI

To The Supreme Court of Ohio.

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In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. ----------.

IN THE MATTER OF THE PETITION FOR A WRIT OF HABEAS CORPUS FOR MERRITT W. GREEN II,

MERRITT W. GREEN II,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI
To The Supreme Court of Ohio.

Petitioner herein, Merritt W. Green II, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Ohio entered on May 17, 1961.

OPINIONS BELOW.

The opinion of the Supreme Court of Ohio is reported in 172 Ohio State, at page 269. It is reported unofficially in the May 22, 1961, issue of the Ohio Bar. The opinion of the Ohio Court of Appeals is unreported but can be found at 47 L. R. R. M. at page 2230. Both opinions are printed in the Appendix hereto.

STATEMENT OF JURISDICTION.

The judgment of the Supreme Court of Ohio was entered as of May 17, 1961. There was no motion for a rehearing.

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257 (3), inasmuch as the Ohio courts have denied the petitioner rights and privileges under federal

statutes specially set up and claimed and have also denied rights and claims of the petitioner guaranteed under the Constitution of the United States.

QUESTIONS PRESENTED.

Is an attorney denied due process of law when he is convicted of contempt of court for proffering good faith advice to his clients that a violation of an ex parte temporary injunction provided a means of testing the jurisdiction of the State court over the subject matter?

Is a lawyer who in good faith advises his client that a state court was without jurisdiction to issue an ex parte injunction prohibiting peaceful picketing by employees at the premises of an employer engaged in interstate commerce, denied due process of law and equal protection of the laws by the refusal of the trial court to grant him a trial or permit him to give testimony, call witnesses, or otherwise answer a written charge of *indirect* contempt lodged against him *by the state court Judge* for giving such advice?

May a state court circumvent the supremacy clause of the federal constitution by the device of issuing an ex parte temporary injunction in a labor dispute affecting interstate commerce preventing a labor organization from engaging in activities protected by the Labor-Management Relations Act and then summarily refusing to set or hold a hearing on the question of the jurisdiction of the court over the subject matter of the action and punishing the union's lawyer for advising his client that the court acted beyond its jurisdiction in granting the injunction?

May a state court issue an ex parte temporary injunction prohibiting peaceful picketing in a labor dispute affecting interstate commerce solely on the basis of a petition which does not allege acts of violence or conduct likely

to produce violence, mass picketing, threats, intimidation, any kind of disorder or breach of the peace arising from the picketing of the employer's premises, but alleges only a conclusion that to permit picketing to continue "will result in danger to life and limb of the employees of the plaintiff's company and irreparable loss and damage to property of the plaintiff's company and that the plaintiff has no adequate remedy at law"?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED.

The constitutional provisions involved are that portion of Section 1 of the 14th Amendment to the Constitution of the United States which reads as follows:

> "* * *; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

And that portion of Article VI of the United States Constitution which reads as follows:

> "* * * This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in Constitution or Laws of any State to the Contrary notwithstanding."

The statutory provisions involved in this case are those contained in Sections 7 and 8 (157 and 158) of the Labor-Management Relations Act of 1947, as amended, 29 U. S. C. 141 *et seq.*, and that portion of Section 10 (a) (160) of the Act which reads as follows:

> "The Board is empowered as hereinafter provided, to prevent any person from engaging in any unfair labor

practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *"

Sections 2705.02, 2705.03, 2705.05, 2727.03 and 2727.06 of the Revised Code of Ohio, as they pertain to this case are set out in the Appendix.

STATEMENT OF THE CASE.

The petitioner is a young Toledo lawyer, a member of the Bar of Ohio. He was cited for an indirect contempt of court and was sentenced to a term in jail and to pay a fine without being afforded a hearing or trial.

The charges of contempt arose out of the petitioner advising the regional counsel of a labor union that an ex parte temporary injunction issued by a Judge of the Court of Common Pleas of Lucas County, Ohio, was, in his opinion, a nullity for the reason that the state court did not have jurisdiction over the subject matter of the action and that, in view of the adamant refusal of the issuing court to grant a hearing, the order could be tested quickly on an application to a higher court for a writ of habeas corpus if picketing continued and the pickets were held in contempt by reason thereof.

The initial issue raised by this petition is, we believe, one of first impression here in this context. It is of critical importance to the members of the legal profession in the United States as well as their clients. It concerns the right and obligation of lawyers to give, and their clients to receive, full and mature advice in the critical area of labor-management relations and elsewhere.

This petition also addresses itself to the never ending vigilance required to safeguard the requisites of due process and specifically to the right of a lawyer to have

the minimal standards of a fair hearing when cited for indirect contempt for having given his clients honest, even if erroneous, advice.

This case is of vital importance insofar as it affects the national labor relations policy because the Ohio courts have sanctioned the use of the ex parte state court injunction to ban peaceful picketing without reference to the interstate character of the dispute or the jurisdiction of the court over the subject matter. This they have done by labeling the temporary injunction a status quo order which somehow becomes and remains a valid order until the issuing court has the inclination or the time to determine whether it had jurisdiction over the subject matter in the first instance.

This theory of the Ohio court permits the wholesale circumvention of the supremacy clause of the United States Constitution where interstate labor matters are involved and will greatly weaken the uniform administration of our national labor policy.

Also involved is the crucial question whether the preemption doctrine which has been thoroughly defined by this Court can be wiped out by a state court assuming jurisdiction over a labor dispute between an interstate employer and his employees by the simple device of vaguely suggesting in a petition for injunction that danger and loss *could* result if picketing is not prohibited, *without supporting such a conclusion by any facts.*

These background facts are pertinent:

Friday, May 27, 1960, was the Friday before the Memorial Day holiday, which fell on Monday.

That morning the petitioner was retained by the International Longshoremen's Association, a labor organization having its regional headquarters in Chicago, to represent the local union in Toledo (R. 43). Its members were in-

volved in a labor dispute with the Toledo Marine Terminal, Inc. The members, employees of the Terminal Company, were then engaged in peaceful picketing of the premises of the employer (R. 22).

It is admitted by everyone that the employer was engaged in interstate commerce and that the picketing by the union members was in all respects orderly and peaceful (R. 3, 6).[1]

Upon being retained, the petitioner contacted counsel for the Toledo Marine Terminal, Inc. to advise him that he was representing the union (R. 44).

That afternoon the petitioner was notified, *not by counsel* but by the court clerk's office, that an action for injunction had been filed and had been assigned to Judge McCabe. The petitioner immediately talked to Judge McCabe by phone. He informed Judge McCabe that he represented the union and that if a request was made for an immediate injunction, he would be available for a hearing upon a moment's notice and requested to be called in such an event. He was assured that he would be called if such a request was made (R. 45 and 46).

He waited in his office for such a call. *None came from the Judge or from opposing counsel.* Instead, he learned later from a call by a courthouse employee that a temporary injunction had been granted (R. 46).

Upon hearing of this unexpected, if not strange, turn of events, the petitioner and his associate met with the

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[1] Judge Younger at the start of his Ohio Court of Appeals dissenting opinion said (App. p. 47, infra):

> "It is admitted by all parties here that the plaintiff in the case in which this contempt proceeding arises, The Toledo Marine Terminal, Inc., is engaged in interstate commerce and that the picketing by the defendant members of the International Longshoremen's Association was entirely peaceful and non-violent."

court in chambers. This is what then took place (Record, starting at page 46):

> "* * * I told him I would like to have a hearing on the issuance of the restraining order. *He said definitely and flatly that I was not going to have a hearing*, that Mr. Ragan had told him that everyone was happy with the contract and that some hoodlum from Detroit had come to Toledo and forced them to go back on strike and he wasn't going to let these outsiders come down here and push us around. *I protested that these were not the facts* and that the position of the union was that the persons who signed the agreement had no authority to do so *and further suggested that the court had no jurisdiction. He again said that I was not going to get a hearing on the matter and that he would make a little jurisdiction.*
>
> *"I told him that I was entitled to an immediate hearing on the matter particularly in view of the question of jurisdiction and he replied that he did not have time and that I would have to wait my turn."*

The Judge was informed that the petition had not prayed for a restraining order pending a hearing on a temporary injunction[2] but had prayed for only a temporary injunction and that he had issued a temporary injunction.[3] In reply to this the Judge said (R. 47):

> "He replied that he did not read the petition very carefully and could not really say what it was all about

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[2] Under Ohio law (Section 2727.06 R. C.) restraining orders are permissible only when a court sets a motion for a temporary injunction for hearing, in which event a restraining order may issue pending the hearing of the temporary injunction. Here no such hearing was set.

[3] Throughout the proceedings the court considered the order as a temporary injunction. At page 20 of the Record the court said "* * *, this Court granted the temporary injunction." At page 31 of the Record: The Court: "Well, we will take first things first. First, of course, will be the violation of the temporary injunction."

but felt that he could take Mr. Ragan's word for the contents and again said that he did not have time to set the matter down for hearing, either now or in the future."

Had the court examined the petition filed by the employer (R. 10) instead of relying on statements of counsel before issuing the ex parte injunction, or had the court honored the assurance given the petitioner that he would be notified if a temporary order was requested or observed the Canons of Judicial Ethics relating to the issuance of ex parte injunctions,[4] the court would have learned not only that there *was not* in existence a completed contract (R. 18), but that interstate commerce was involved (R. 3); that peaceful picketing was in progress; that a labor dispute was then in existence and negotiations for settlement were in progress (R. 4); and that an unfair labor practice had been filed with the National Labor Relations Board charging the employer with refusal to bargain in good faith (R. 4, 23).

Instead of resorting to Detroit hoodlums to make a little jurisdiction the court would have been able to discern that the conduct sought to be enjoined was arguably or potentially subject to the Labor-Management Relations Act of 1947 as amended.

The Judge absolutely refused permission for another Judge to hear the matter (R. 48). (In Lucas County when a case is filed it is assigned to a Judge and stays with that Judge for determination of all matters from the beginning to the end of the lawsuit.) He did (R. 49), after a great deal of urging, agree to have Mr. Ragan, attorney for the plaintiff, appear that afternoon for a hearing on the question of the court's jurisdiction. The Judge assured the

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[4] Canon 16: Ex parte applications.

petitioner that he would contact him as soon as Mr. Ragan was contacted.

Again not hearing from the Judge, the petitioner called him at 4:00 o'clock that afternoon. This is what took place (R. 49):

> "Judge McCabe said that he had contacted Mr. Ragan but that he was about to leave and did not intend to hold night court. I requested that he hear the matter on Saturday and he stated that he would not be in over the weekend. I requested a hearing on Tuesday (Monday being a holiday) but he declared that he had a trial on that day and further said that it looked like the rest of his week was filled."

Convinced that Judge McCabe had no intention of granting a hearing, the petitioner and his associate consulted the authorities and concluded that an order made by a court in a matter over which it had no jurisdiction is void and contempt could not be predicated thereon. On the basis of this conclusion the petitioner called Mr. Friedman, regional counsel for the international union in Chicago where negotiations were then being conducted, and advised him of the status of the matter (R. 50):

> "I explained to him that though it was possible to file a motion to vacate or demurrer to the petition that it was apparent from the actions of the court that such a motion would not be set down for hearing in the near future and that even if it were, an adverse ruling, which seemed most likely in view of the court's attitude, would not be a final order and could not be appealed.[5] I then told him that if we were correct on the law that the order of the court was wholly invalid, then the only alternative would be to defy the order of the court in the hope that Mr. Ragan would file contempt proceedings which undoubtedly would be heard

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[5] Temporary orders are not appealable in Ohio.

immediately and from which we could instantly appeal to the Court of Appeals to determine the jurisdiction of the court.

"Mr. Friedman said that he would have to take the matter up with the officials of the union and that he would contact me later in the evening * * *."

"At about 8:00 P. M. Friday evening I received a call from Mr. Friedman who advised me that the union officials had considered the matter in detail and had concluded that on the basis of my report to them that their only possible course was to continue to picket. I thereupon called the union hall and told them of the decision of the officials and asked them to communicate this information to the pickets."

The above quoted portions of the record are part of the unrefuted testimony of the lawyer before the Court of Appeals at his hearing for a writ of habeas corpus (R. 43-54). It is obvious from the record that the alleged acts of contempt on the part of the lawyer-petitioner were confined to those at 4:00 o'clock Friday afternoon when he talked by phone with the union's counsel in Chicago.

Upon the instructions of the union officials some peaceful picketing continued at the premises. As a result, the employer filed an affidavit of contempt on May 31, 1960, naming one union member (R. 19). That ended the first phase of the case.

The second phase of this case started Tuesday afternoon, May 31, 1960, in chambers, when the court, the petitioner and counsel for the employer discussed procedure to be followed in contempt proceedings involving the pickets. First the petitioner told the court (R. 53) that he had a motion to vacate the temporary injunction prepared and would file it immediately if he could obtain an early hearing. The court not only flatly refused but declared

that it would be impossible to obtain a hearing within the week. Then the following arrangement was entered into:

> "Mr. Ragan then suggested that as an alternative that I agree to submit to the court the four signators of the agreement to be dealt with on contempt. After some discussion I agreed to do so and stated to both Judge McCabe and Mr. Ragan that I would gladly stipulate all matters necessary to establish the contempt so that I could immediately appeal the decision or file habeas corpus proceedings.
>
> "* * * I was convinced that both the Judge and Mr. Ragan were aware that I had consented to bring these men before the court and stipulate the essential matters for the express purpose of testing the validity of the court's order and its jurisdiction over the subject matter. So far as I was concerned, the matter was clear cut and the hearing the following day was to be short and to the point. To that end I prepared the necessary habeas corpus proceedings."

The next day, June 1st, the petitioner produced the four men in court as agreed, and after stipulating picketing had continued (R. 23) the petitioner went on to advise the court as follows:

> "I don't think any discussion would be fruitful except to show that this matter has been brought to the attention of the National Labor Relations Board; an unfair labor practice charge has been filed against the employers for failing to bargain faithfully; that matter has been docketed in Cleveland, No. D-C-A 2168; as we had indicated before, in our discussion before * * *, we felt that when an order is made by a court which lacks jurisdiction over the subject matter of the action; it could not be a valid order, therefore, no process for contempt can issue in the face of its invalidity. We charge that this Court does not have jurisdiction by virtue of the fact that the National Labor Relations

Act has been amended, and, since 1947, reposes the entire jurisdiction over this matter in the National Labor Relations Board, that this clause of a collective contract which has been violated, if we take the statements of the employer as correct, has been violated by the picketing and this picketing ensued without the necessary notification being given * * *."

Ignoring the fact that the procedure they had just been through was one agreed upon in the court's chambers the day before, the court then demanded to know of the men in court why they had violated the order of the court or whether they were told by someone to do that. During the course of the questioning of the men by the court, the petitioner spoke up and said, "I can advise the court now that they were told by me." The petitioner then went on to explain that after the ex parte injunction was issued and the court had again and again refused to grant or set a time for hearing on the question of jurisdiction, he had explained the entire situation to the union's counsel in Chicago.

After this explanation the court wanted to know whether the men acted on their own initiative or whether someone told them to disobey the order of the court. The following from the record, at page 30, answered that question:

"Mr. Green: I have said, I have already said to the court that they obviously did not act on their own initiative.

The Court: Who did?

Mr. Green: *Well, they were—*

The Court: Who did?

Mr. Green: *—instructed to do so by their superiors in the union* in this case according to their own agreement, after they were advised by counsel that the order was not—

The Court: That is a contempt of court."

In concluding the June 1 hearing the court said (R. 31):

> "They can either go back to work or they can come in here on Friday morning at 10:00 o'clock and purge themselves of contempt."

Whether or not the court had a right to issue the injunction in the first place is one thing, but ordering the men back to work is another, and, we submit, placed the court in the position of using its authority in an effort to break the strike.

The men did not return to work as ordered by the court and did appear in court on Friday, June 3, as directed. The hearing held on that day was somewhat repetitious of the June 1st hearing. The court never did get around to make an order holding the men in contempt so that a writ of habeas corpus could be filed to test the court's jurisdiction.

Instead, the court started to badger and insult the petitioner who tried to explain to the court that inasmuch as the men were involved in a proceeding criminal in nature they were not required to testify against themselves, whereupon the court made this statement.

"You also advised them to violate an order of the court, too," to which the petitioner replied, "I did," obviously meaning that he had advised the union officials in Chicago that the only possible way to get a hearing by this court would be for them to violate the temporary injunction so that the order could be tested in the habeas corpus proceedings.

When the petitioner said that he did advise them, the court announced that the petitioner was in contempt. The petitioner was ordered to appear in court the following Tuesday, June 7. On Monday, June 6, the Judge signed and filed written charges against the petitioner under

authority of, according to the charges filed, Section 2705.02 and 2705.03 of the Revised Code of Ohio (R. 35).

On June 7th the petitioner appeared as directed (R. 37, etc.). At that time the court refused to grant him a hearing or trial, or permit him to testify under oath, saying (R. 55) that he was only there for sentencing. The petitioner's lawyer, over the objection of the court, then read into the record what the petitioner would have said under oath had he been permitted to testify. (Present in the court room to testify on petitioner's behalf were the union's regional counsel from Chicago and local and international union officers.) The record, pages 40, etc., discloses the following took place at the June 7 session of court:

"Mr. Green: Now, may I ask of the court what is conceded to be the posture of this case today?

The Court: He is in contempt of court, I told you.

Mr. Green: Has the court already—let me ask this way—are we—*is my client here only for the purpose of being sentenced for the contempt that the court alleges that was found in him?*

The Court: *That is correct*, Mr. Green.

* * * * *

The Court: *The procedure is he is here in contempt of court. The court must punish him for contempt of court.* I take it that you have consulted the courts on this matter earlier; I take it you have read the Supreme Court decisions on matters of contempt; I know your son didn't. I thought maybe you might.

* * * * *

Mr. Green: *Are we for hearing or trial or what?*

The Court: *You are not here for any hearing or trial.* * * *

Mr. Green: So prior to sentencing, *in view of the fact that the court has already found him in contempt*—

The Court: *That's right—*

Mr. Green: In mitigation, that is all I can say, *I am going to ask the respondent to be sworn, put under oath,* and I think he has that right. And tell for the record under oath exactly what transpired from the very beginning of this case. I think he has that right, Your Honor, and I as counsel believe I have the right to speak on his behalf, or he can himself—and I will repeat exactly what he would testify to you under oath. * * *

Mr. Green: * * * *I am asking the privilege of putting the respondent on the stand—*

The Court: No. The courts have made the pronouncement on that * * * *You are too late for that. You are too late.*

* * * * *

Mr. Green: I understand that *the court is refusing counsel for the respondent and the respondent the right to any mitigation, because you have already found him in contempt?*

The Court: That's right.

Mr. Green: *Without further hearing, without a trial? That you are refusing to let either counsel or the respondent to show or say for the record in mitigation to this court, everything that transpired.*

* * * * *

Mr. Green: You mean to tell me that you are forbidding us to put into the record everything that transpired so that a higher court could determine the fact, whether a lawyer is guilty of contempt of court, whether he acted in a manner that was contemptuous?

The Court: Mr. Green, there is nothing before this court on the theory that you now advance.

Mr. Green: But it has to be before the court, Your Honor.

Mr. Green: This is the record *I want to read into the record what the respondent would testify to if permitted to testify under oath,* * * * *as already*

indicated." (Emphasis ours.) (Proffered testimony begins R. 43.)

Following this (R. 56) the court ordered the petitioner committed to the Lucas County jail for ten days and to pay a fine of $500.00 and stand committed until the fine is paid. Upon the refusal of the court to grant bail, a petition for a writ of habeas corpus was immediately filed in the Court of Appeals of Lucas County, Ohio (R. 1), where, after oral argument, briefs were ordered.

The petitioner was committed to the custody of a bondsman pending final determination. At the Court of Appeals hearing the petitioner was put under oath and it was then stipulated that he would testify as appears in the record (pages 43 through 53). This testimony is unrefuted.

The Court of Appeals, one Judge dissenting, refused to release the petitioner from the custody of the Sheriff. (App. p. 46, *infra.*) On appeal to the Supreme Court of Ohio the judgment of the Court of Appeals was affirmed in a 5 to 2 decision. (App. p. 36, *infra.*)

HOW FEDERAL QUESTIONS PRESENTED.

The question of the state court's jurisdiction was necessarily raised upon the presentation of the petition for injunction to the court in chambers. The court should *then* have determined whether jurisdiction was in the state court or was in the area preempted by reason of the Labor-Management Relations Act.

Immediately following the issuance of the ex parte injunction, the petitioner raised the question of lack of jurisdiction, but in each instance the state court refused consideration of the question.

On June 1st and June 3rd, at the hearings of the union members on contempt of court charges, the state court's jurisdiction was questioned. On June 7th, when the petitioner was ordered into court to answer contempt charges, the court again refused to consider the question of its jurisdiction (R. 40, 41, 55). At that time the court also refused the petitioner a trial, a reasonable opportunity to defend himself, or to testify or be heard in his defense, or to produce or examine witnesses (R. 40, etc.).

The question of the jurisdiction of the state court to issue the initial injunction upon which the contempt citations rested was raised both orally and in briefs filed before the Court of Appeals. The denial of due process of law was also raised orally and in briefs in the Court of Appeals.

The lack of jurisdiction, the denial of due process and equal protection under the Federal Constitution were raised in the Assignment of Errors filed in the Supreme Court of Ohio and were thoroughly discussed in the brief filed by the petitioner to support the Assignment of Errors.

The opinion of the Supreme Court of Ohio shows on its face that these federal questions were considered by that court (App. pp. 30-36, *infra*).

REASONS FOR GRANTING THE WRIT.

Right and Duty of Lawyer to Advise.

This Court condemned the use of contempt to silence a lawyer in the honest discharge of his duty to a client in the case of *In re Watts*, 190 U. S. 1 (1902). The case involved two lawyers who had been convicted of contempt when they mistakenly arrived at the conclusion that the state court of Indiana had jurisdiction superior to the federal district court in a bankruptcy action. In reversing the contempt conviction by the federal district court, Chief Justice Fuller stated at page 28:

> "* * * we decline to entertain the suggestion * * * that members of the bar can be intimidated in the discharge of their duty."

One other statement by Chief Justice Fuller at page 29 in that case brings into focus the sharp conflict between the Ohio courts and this Court on the right of members of the legal profession in good faith to advise their clients:

> "* * * the essence of the alleged contempt was that, assuming that action was taken pursuant to the advice of these attorneys, they were liable to condemnation for giving such advice. In the ordinary case of advice to clients, if an attorney acts in good faith and in the honest belief that this advice is well founded and in the just interests of his client, he cannot be held liable for error in judgment. The preservation of the independence of the bar is too vital to the due administration of justice to allow of the application of any other general rule."

The sharp conflict between the Ohio decisions and the law laid down by this Court is evident from these facts: The advice given by the petitioner here was given after a thorough examination and research of the law. The several citations which appear in this petition provide

ample authority for the procedure adopted and the advice given. The advice was given in good faith and without any attempt to malign or bring the court into disrepute. It was a candid effort on the part of the petitioner to test the jurisdiction of the trial court over the subject matter of a labor dispute affecting interstate commerce after the court left no other course open for the determination of the issue. All parties involved were aware that the procedure adopted by the petitioner was a technical means of obtaining a final and appealable order.

The independence of the bar in the administration of justice is as important before state courts as it is before federal courts, particularly when the state courts are interfering with the administration of federal law.

Due Process Requires a Fair Trial.

In asking this court to grant a writ of certiorari for the reason that the petitioner was denied due process of law in not receiving the rudiments of a fair hearing before a fair tribunal we do not urge any expansion of the outer limits of the concept of civil rights. The peculiar facts of this case add up to disclose a shocking conflict with, and a total failure to respect, the basic rights of this lawyer as a citizen and the rights of the labor organization under the constitution and federal law.

All parties including the Judge who sentenced the petitioner were aware fully a week prior to his conviction of the theory upon which the petitioner proceeded in this case.

The court seized upon isolated statements at the hearings of the union officers, statements torn completely out of context, and during the last of such hearings declared the petitioner was guilty of contempt of court for advising his clients.

When the petitioner appeared before the same Judge on June 7th, 1960, no evidence was introduced respecting the crime with which the petitioner was charged. Only brief statements were made by the court to the effect that the petitioner had advised the defendants to disobey the order of the court and was, therefore, in contempt. Despite the fact that the proceedings constituted criminal contempt the petitioner's counsel was not permitted or afforded the opportunity to inquire into the statements made by the court nor was the petitioner permitted to take the stand in his own behalf or produce other witnesses or evidence. The court instead clearly stated that the only purpose of convening court on the 7th day of June, 1960 was for the purpose of sentencing the petitioner.

The amazing conflict between the conduct of the Ohio trial court and the minimum requirements of due process established by this Court are evident by only a casual reference to three decided cases.

In the case of *In re Oliver*, 333 U. S. 257 (1947), this Court laid down the law that a defendant in indirect contempt proceedings is guaranteed (1) the right to reasonable notice, (2) a right to a trial, (3) a reasonable opportunity to defend himself, (4) the right to testify and be heard in his defense, and (5) the right to examine witnesses.

In an earlier case, *Cooke vs. U. S.*, 267 U. S. 517 (1925), this Court held that even though knowledge of the alleged contempt be acquired from the testimony of others, *or even from the confession of the accused*, those facts would not justify conviction without a trial in which there was an opportunity for defense.

One statement from the *Cooke* case magnifies the denial of due process to the petitioner in this case. At page 537 this Court said:

"Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if desired, and the right to call witnesses to give testimony relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed."

In a subsequent case before this Court, *In re Murcheson, et al.*, 349 U. S. 133 (1955), a case arising out of the use of the one-man grand jury system in Michigan, the question before the court was whether a contempt proceeding conducted in accordance with the minimum standards established in *Re Oliver, supra,* "complies with the due process requirement of an impartial tribunal" where the same judge presiding at the contempt hearing had also served as the "one-man grand jury" out of which the contempt charges arose.

At page 136 the court said:

"A fair trial in a fair tribunal is a basic requirement for due process."

At page 137 this:

"Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer."

The statements attributable to the petitioner by the Ohio courts as justification for the denial of a trial are wholly inaccurate when viewed in the context of the entire record. The honest statements of the petitioner at the June 1st and June 3rd hearings were not contemptuous per se and involve no more than a recitation of facts which had occurred outside the courtroom. The refusal to accord the petitioner an opportunity to explain those statements

and to call witnesses to verify his explanation is, we suggest, in direct conflict with everything established in *Cooke, Oliver* and *Murcheson* as basic elements of due process of law to be accorded to every citizen.

Use of Ex Parte Orders to Circumvent Supremacy Clause.

The procedure adopted by the petitioner to test the jurisdiction of the state court was the product of necessity born of unusual circumstances.

The court, despite assurances given to the petitioner, issued an ex parte temporary injunction ordering all peaceful picketing to cease in a labor dispute affecting interstate commerce. Thereafter the court refused to hold a hearing before the final hearing on the permanent injunction. Convinced that the court did not intend to determine the issue of jurisdiction and firmly convinced that the ex parte order was void and if obeyed would have the immediate effect of destroying the concerted bargaining power of the employees, the petitioner then suggested to the union regional counsel the possibility of obtaining a hearing via habeas corpus.

The procedure agreed upon in chambers on May 31, 1960 was adopted on the conviction that an order issued by a court not having jurisdiction over the subject matter is void and contempt cannot be based on violation of such an order.

The theory of the petitioner was certainly consistent with this court's holding in *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America vs. Wisconsin Employment Relations Board*, 340 U. S. 383 (1951) as well as decisions on the same issue by the highest courts of Texas, Michigan, and Indiana.

In each of those cases the court held that the Labor-Management Relations Act had pre-empted the jurisdic-

tion over the subject matter of the action thereby rendering the temporary injunction or restraining order void and in each instance contempt convictions issued by the trial courts for disobedience of the void orders were declared unenforceable. Parenthetically, in none of the cases was there a hint or suggestion that the attorney representing the defendants seeking this means of testing the jurisdiction of the court should be held in contempt for the advice given their clients.

In the United States Supreme Court case last cited, the Wisconsin Employment Relations Board obtained an ex parte restraining order from a State Circuit Court requiring that the petitioners "absolutely desist and refrain from calling a strike, or going out on strike * * * which would cause an interruption of the service of the (Gas Company)" and ordering the petitioners to "take immediate steps to notify all employees called out on strike to resume service forthwith." The State Circuit Court found that the petitioners had not obeyed the restraining order and entered a judgment of contempt.

This court reversed the contempt conviction, holding that the subject matter of the particular dispute had been pre-empted by the enactment of the Labor-Management Relations Act of 1947 and, therefore, the contempt order of the State Circuit Court was unenforceable.

There is absolutely no difference in substance between the procedure adopted by the petitioner in the present case to test the jurisdiction of the Ohio trial court over the subject matter of the dispute and that adopted by the attorneys representing the unions in the Wisconsin case.

The Supreme Court of the State of Texas in the cases of *Ex Parte Dilley,* (1960) 334 S. W. (2d) 425, and *Ex Parte Twedell,* 158 Texas 214 (1958), 309 S. W. (2d) 834; the Supreme Court of Michigan in the case of *Town and*

Country Motors vs. Local 328 I. B. T., 355 Mich. 26 (1959), 94 N. W. (2d) 442 and the Supreme Court of Indiana in *State Ex Rel. Taylor*, (1959) 162 N. E. (2d) 90 have approved the procedure followed by the petitioner. These cases are on all fours with this case.

The Ohio courts by their decisions here sanction the circumvention of the Supremacy Clause of the United States Constitution by holding that every ex parte temporary injunction is a status quo order to preserve existing conditions, relying on the decisions of this Court in *United States vs. Shipp*, 203 U. S. 563 (1906), and *United States vs. United Mine Workers*, 330 U. S. 258 (1947), to reach that conclusion.

A cursory examination of these two cases do not, we submit, support the conclusions reached by the Ohio courts.

In those cases interlocutory orders were issued *in order to preserve conditions then existing*. There was no question that the court in each case did have jurisdiction over the subject matter. Neither case holds or infers that an interlocutory order issued by the court *not having jurisdiction over the subject matter* is valid for any purpose.

Our case did not involve a temporary order to preserve existing conditions by a court having jurisdiction over the subject of the action. The injunction sought and granted was the main relief sought and was not ancillary to the main relief as in *Shipp* and *United Mine Workers*.

In the *Shipp* case this Court had granted a petition to appeal the judgment of the Circuit Court of Appeals in a case involving a death sentence decreed by a Tennessee state court. Pending hearing on the appeal, an order was issued to the state officials to stay the execution. This order was violated. There could be no question that the court had jurisdiction over the subject matter, to-wit: The ap-

peal, and had a right to issue a stay order to preserve existing conditions; the life of the prisoner.

In the *Mine Workers'* case the government had filed an action for declaratory judgment to determine the union's right to unilaterally terminate a labor contract with the Federal Government, operator of the coal mines at that time, and requested a temporary injunction prohibiting a strike. The request for a temporary order was set for hearing by the court. Pending the hearing, a restraining order was issued requiring the Mine Workers not to strike. They struck. Again, there is no question that the district court had jurisdiction over the subject of the action, to-wit: the declaratory judgment, and had a right, pending the hearing of the temporary injunction, to issue an order to preserve existing conditions.

In this case no status quo order was issued because: (1) the court did not intend its injunction to preserve existing conditions until it had an opportunity to determine its jurisdiction,[6] (2) under Ohio law (Sec. 2727.03 R. C.) the court was required to determine its jurisdiction in order to issue a temporary injunction.[7] This is so because the petition prayed for only two things, a temporary injunction and a permanent injunction. The court therefore was required to determine whether the plaintiff was entitled to an injunction—to do so the court was required to determine its jurisdiction at that time. If the court followed the law, then, it determined it had jurisdiction over the subject matter when it issued the temporary

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[6] In discussing the remedies open to the union the Court, at the June 1 hearing, made it clear that a status quo order was not intended. At page 29 of the record the Court said: "You could wait until we had a final hearing on the entire matter; that was the only way you could have done it; * * *"

[7] Section 2727.03 R. C., so far as it relates to this case, provides: "At the beginning of an action, * * * an injunction may be granted * * *, when it appears * * *, that the plaintiff is entitled to injunction.

injunction and (3) the conditions existing at the time when the injunction was issued were a strike and picketing, conditions prohibited not preserved by the ex parte order.

The method used by the Ohio courts to circumvent the Supremacy Clause of the Constitution can open the flood gates upon the entire pre-emption doctrine to seriously interfere with the adoption and preservation of a uniform labor policy unaffected by local rules or prejudices as Congress intended when it created the National Labor Relations Board, reposing exclusive and primary jurisdiction in that board for the purpose of resolving and adjudicating all matters protected and prohibited under Sections 7 and 8 of the act.

Lack of State Court Jurisdiction.

The sanction given by the Ohio courts to the prohibition of all picketing arising out of a labor dispute between an interstate employer and his employees is in direct conflict with *Youngdahl vs. Rainfair, Inc.*, (1957) 355 U. S. 131, where this Court held that though state courts can enjoin violence, intimidation and threats of violence by strikers, they cannot encroach upon the exclusive jurisdiction of the N. L. R. B. by prohibiting all picketing.

The only time a state court may enjoin all picketing, this Court held, is when the violent activity is such as to make further peaceful picketing impossible. There is not, we believe, one word in this record to justify a deviation from the law as pronounced by this Court in *Youngdahl, supra.*

The plaintiff in the initial state court action based its prayer for injunction on the claim that the defendants had breached a no strike clause of the alleged contract by again establishing a picket line at the plaintiff's property; *not on acts of violence or disorder by the pickets.*

The petition filed reveals that there was not one single word alleged claiming mass picketing, threats, intimidations, name calling, blocking of entrances, causing traffic delays or stoppage, or any public disorder of any kind or description.

These Ohio decisions also do violence to the clear pronouncements of lack of state court jurisdiction contained in *San Diego Building Trades Council v. J. S. Garmon*, (1959) 359 U. S. 236 and, of course, other pronouncements by this Court in the development of the pre-emption doctrine starting with *Joseph Garner v. Teamsters, Local 776*, (1953) 346 U. S. 485, and on down through *Weber v. Anheuser-Busch, Inc.*, (1955) 348 U. S. 478; *Guss v. Utah Labor Relations Board*, (1957) 353 U. S. 1; *Amalgamated Meat Cutters v. Fairlawn Meats, Inc.*, (1957) 353 U. S. 20; *San Diego Building Trades Council v. J. S. Garmon*, (1957) 353 U. S. 26.

The violence done here to the pre-emption doctrine by the Ohio courts is evident by only casual reference to the second *Garmon* case, 359 U. S. 236.

The opinions in that case make it clear that *the Labor-Management Relations Act has effected a withdrawal of the jurisdiction of the courts of the respective states over any controversy, dispute or conduct which may be said to be arguably protected or prohibited by the Act.*

Two other aspects of the pre-emption doctrine which are particularly applicable to the original injunction action here to prohibit picketing are clearly within the principles stated in the second *Garmon* case, *supra*; principles completely ignored by the Ohio courts. They are:

First, it is the nature of the dispute or controversy as well as the conduct sought to be enjoined, and not the mode of regulation or the cause of action upon which a suit is based that determines which tribunal has jurisdiction to determine the issues involved.

Second, the state courts, in an action to enjoin peaceful picketing, are not to determine whether the court has jurisdiction but rather to determine whether or not the dispute and activity sought to be enjoined are *arguably or potentially* within the jurisdiction of the National Labor Relations Board, deferring to that tribunal full authority to determine whether the dispute or controversy or conduct of the respective parties is a protected, unprotected or prohibited activity under the Labor-Management Relations Act. Any doubt must be resolved in favor of the N. L. R. B. jurisdiction.

These principles are not only enunciated in the second *Garmon* case, 359 U. S. 236, but in decisions of other courts which hold that so long as a dispute between the parties or the conduct sought to be enjoined or regulated is arguably or potentially within the protection or prohibition of the Labor-Management Relations Act, the state court must defer jurisdiction to the National Labor Relations Board regardless of the manner in which the dispute is brought before the court.

Some of these cases are: *Wax v. Mailers Union*, 161 A. (2d) 603 (1960), Penn. Sup. Ct.; *Bert Manufacturing Company v. Local 810, etc.*, 136 N. Y. S. (2d) 805 (1954); *Journeyman, etc. v. Merchee*, 81 Ariz. 162, 302 S. W. (2d) 930 (1956); and *Local 774, I. A. M. v. Cessna Aircraft Co.*, 185 Kan. 183, 141 P. (2d) 989 (1959).

CONCLUSION.

We respectfully suggest that on the basis of the certified record it is clear that the Ohio courts have not only deprived the petitioner of rights guaranteed to him by the Constitution of the United States but their decisions strike at the very heart of the National Labor Policy as estab-

lished by the Labor-Management Relations Act and as interpreted by this and other courts.

In holding that ex parte temporary injunctions are effective to prohibit all picketing in labor disputes involving interstate commerce until the issuing court determines whether it has jurisdiction, the Ohio courts have created a device which will deprive workers of rights granted them under Section 7 of the Act, i.e. concerted activities for the purpose of collective bargaining, and permit acts prohibited by Section 8 thereof.

The facts out of which this case arose clearly illustrate the anti-union weapon forged in these decisions: the ex parte injunction issued solely on information furnished by the employer; refusal or inability of the court to consider its lack of jurisdiction; the effort to force silent submission upon counsel and the union representing the employees; collective bargaining under force of judicial order.

On the basis of all of the foregoing we earnestly believe that this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

OPINION OF OHIO SUPREME COURT.

This cause originated in the Court of Appeals for Lucas County upon the filing of a petition in habeas corpus on behalf of Merritt W. Green, II, a Toledo attorney. The petition is grounded on the claim that Green is (constructively) imprisoned and restrained of his liberty in the county jail of Lucas County without legal authority.

Previously, a written charge of contempt of court had been lodged against Green under the provisions of Sections 2705.02 and 2705.03, Revised Code, by a judge of the Court of Common Pleas of Lucas County in a case pending in that court, numbered 188631 and entitled *Toledo Marine Terminals, Inc., v. International Longshoremen's Assn., AFL-CIO, Local 1317-A*, wherein the court granted an order restraining and enjoining the defendants and persons associated with them from committing certain acts involving the picketing of the plaintiff's premises in Toledo and interfering with its business operations. Such charge alleged that Green, legal counsel for defendants, with full knowledge of the restraining order did order and advise the defendants to disobey the same, and that the defendants, acting upon such counsel and advice, did so. Such charge further alleged that Green, after being notified in open court by the judge that he was in contempt of court, did and does continue to advise defendants to continue to disobey such order of the court. Green was then formally and specifically charged with being in contempt of court and a hearing was set for Tuesday morning, June 7, 1960.

Such hearing took place as scheduled, and Green was found guilty, sentenced to serve 10 days in the county jail and fined $500. The present action in habeas corpus followed. Upon the hearing before it, the Court of Appeals

decided, by a two-to-one vote, against Green and found that he was not being unlawfully restrained of his liberty.

An appeal as of right brings the cause here for review.

ZIMMERMAN, *J.* Seeking a reversal of the judgment of the Court of Appeals, Green, hereinafter referred to as appellant, makes three principal contentions: (1) That the Court of Common Pleas in the case instituted in that court was without jurisdiction to issue the restraining order described since the controversy was exclusively within the jurisdiction of the National Labor Relations Board under the National Labor Management Relations Act of 1947 (Section 141 *et seq.*, Title 29, U. S. Code), and hence a contempt proceeding based on any violation by appellant of such restraining order was a nullity; (2) that advice given by appellant to his clients relating to the disobedience of such order was within appellant's rights and duties as an attorney and did not represent contempt of court; and (3) that appellant was denied due process of law in the hearing of the contempt charge against him.

In the original verified petition filed in the Court of Common Pleas, plaintiff, Toledo Marine Terminals, Inc., alleged that at the time of filing the petition no labor dispute existed between it and the defendant association; that a labor contract binding on both plaintiff and defendant association had been signed on May 26, 1960 (effective until April 1, 1961); that on the day of the filing of the petition, viz., May 27, 1960, the defendant association began picketing at the entrance to plaintiff's property in direct violation of such labor contract which provided, *inter alia*, that "there shall be no stoppage of work caused by lockouts, walkout, sit-down, or slow-up of any kind or nature whatsoever, during the term of this agreement"; that the conduct of the defendant association in picketing

plaintiff's premises and calling a strike are illegal acts; that a continuation of the same, unless enjoined, will result in damage to the life and limb of plaintiff's employees and irreparable loss to plaintiff's property; and that such conduct has created a serious emergency of such a nature as to require the issuance forthwith of a temporary restraining order.

In such petition, plaintiff prayed as follows:

> "Wherefore, plaintiff prays that pending final hearing and determination of the issues herein, a restraining order be issued forthwith against the defendants and each of them, their officers, agents, members and other persons associated with and acting in concert with the defendants, and all others to whom knowledge of this order should come, restraining and enjoining them * * *."

Then followed a description of the acts sought to be enjoined in relation to the picketing of plaintiff's premises and other interferences with its operations.

On the same day, viz., May 27, 1960, the court issued the restraining order as prayed for. At a hearing held on June 1 and 3, 1960, on charges of contempt brought against certain of those connected with the defendant association who were alleged to have disobeyed the court's restraining order, and again on June 7, 1960, at the hearing of the charge of contempt against appellant, the evidence established that appellant deliberately advised his clients to disobey the court's restraining order. During the hearing on June 1 and 3 the following took place:

> "The Court: I want to know from them [those charged with contempt] before that can be done [an appeal], give them an opportunity to purge themselves. * * * I want them to explain to me why they violated the order of the court. * * * I want them to

tell me whether they just did that or whether they were told by some one to do that; I want to know.

"Mr. Green [appellant herein]: I can advise the court now that they were told by me.

"* * *

"The Court: * * * The opportunity is always given, of course, to any one who has violated an order of the court, to purge themselves if they choose to do so; so I think they [the ones charged with contempt] should be called upon; well, I don't know whether they are represented by any one or not.

"* * *

"Mr. Green [appellant herein]: They are represented.

"The Court: By an attorney?

"Mr. Green: They haven't taken my license away yet.

"The Court: Well, what do you propose to do?

"Mr. Green: If the court please, assuming they are resting, I propose to rest also, Your Honor. We are really here in a criminal proceeding and my clients are not required to testify in such a general action, they are not required—

"The Court: You also advised them to violate an order of the court, too.

"Mr. Green: I did."

At the contempt hearing on June 7, 1960, Merritt W. Green, appellant's associate in the law practice and one of his attorneys, read from a written statement prepared by appellant and containing the language, "that regardless of the private opinions of the court respecting the validity of the contract that the court had no jurisdiction over this matter and that he was forcing us to advise our clients * * * of their rights not to obey the order."

In its broad sense, a contempt is a disregard of, or disobedience to, the order or command of a public authority, legislative or judicial. In its restricted and more usual

sense, contempt comprehends a despising of the authority, justice or dignity of a court; and one is guilty of contempt whose conduct is such as tends to bring the administration of the law into disrespect and disregard or otherwise tends to impede, embarrass or obstruct the court in the performance of its functions. 11 *Ohio Jurisprudence* (2d), 90, Section 2; 12 *American Jurisprudence*, 389, Section 2.

This statement is applicable with particular force to an attorney at law. An individual against whom an order of a court is directed may violate such order and properly urge in his defense in a contempt proceeding that the order is void. But does not an attorney stand in a somewhat different position? He is an officer and arm of the court and as such has a duty to recognize and uphold the orders of the court as long as such orders stand. Consequently, an attorney who brashly advises his client to disobey an existing court order is in contempt of court notwithstanding any vulnerability that may attach to such order.

But aside from such observations, on its face the petition filed in the Court of Common Pleas by the Toledo Marine Terminals, Inc., against the International Longshoremen's Association and others, does not disclose that the court lacked jurisdiction to entertain the same. The restraining order issued on the petition was preliminary and temporary in nature and *no motion was filed to dissolve it nor was any other instrument interposed challenging the court's jurisdiction.* Usually and in the first instance, a court of general jurisdiction, such as the Court of Common Pleas, is competent to determine its own jurisdiction (14 *Ohio Jurisprudence* [2d], 517, Section 100) and should be accorded fair opportunity to do so. It appears to us that appellant assumed too much too soon in deciding for himself that the court was without jurisdiction and in advising his clients to act on his decision in defiance of the court's order.

It is to be noted that the petition filed in the Court of Common Pleas on which the restraining order was based alleged the imminence of violence in connection with the picketing of plaintiff's premises. Even in labor disputes where the federal labor relations statutes are applicable and exclusive, the Supreme Court of the United States has held that state courts possess the authority to intervene to enjoin mass picketing or picketing accompanied by violence and intimidation. Annotation, 2 L. Ed. (2d), 1636.

The Supreme Court of the United States has also said that a court possesses the power to determine its own jurisdiction, that a temporary restraining order issued by the court must be obeyed regardless of the final jurisdictional determination, and that one who disobeys such an order does so at his peril and may be amenable to criminal proceedings in contempt. *United States v. Shipp*, 203 U. S. 563, 51 L. Ed., 319, 27 S. Ct., 165, 8 Ann. Cas., 265; *United States v. United Mine Workers of America*, 330 U. S., 258, 91 L. Ed., 884, 67 S. Ct., 677.

Or stating it a little differently, affected persons having notice of a restraining order issued on a verified petition or complaint by a court of general jurisdiction must obey the order until it is set aside by orderly judicial process, and deliberate disobedience of such an order while it is in force subjects the violators to contempt proceedings. See *Howatt v. Kansas*, 258 U. S., 181, 189, 66 L. Ed., 550, 559, 42 S. Ct., 277, 280; *Smotherman v. United States* (C. C. A.—10), 186 F. (2d), 676; *In re Lord*, 255 Minn., 370, 377, 97 N. W. (2d), 287, 292; and *Aladdin Industries, Inc., v. Associated Transport, Inc.* (Tenn. App.), 323 S. W. (2d), 222, 228, certiorari denied, 361 U. S., 865, 4 L. Ed. (2d), 104, 80 S. Ct., 117.

We are, therefore, of the opinion that the Court of Common Pleas possessed the authority to cite appellant

for contempt, and that, on proof thereof, punishment was imposable.

There is no denying that appellant possessed the right to advise his clients that in his opinion the Court of Common Pleas was without jurisdiction of the cause and acted beyond its powers in issuing the restraining order, but when he went further and told them to disobey the order, which they did, he laid himself open to the contempt charge.

As to the hearing had on such charge on June 7, 1960, it was not conducted with the decorum and restraint it should have been, but to say it was of such a character as to deny appellant due process of law is hardly justified. The contempt had already occurred as disclosed in the hearing on June 1 and 3, and the judge presiding over that hearing was the same judge who issued the restraining order and who conducted the proceedings on June 7.

We deplore an unfortunate situation of this kind and the acrimony which apparently developed between the judge and the appellant, but we find no sufficient reasons to reverse the judgment of the Court of Appeals. Therefore, that judgment is affirmed.

Judgment affirmed.

WEYGANDT, C. J., MATTHIAS, RADCLIFF and O'NEILL, JJ., concur.

TAFT and BELL, JJ., dissent.

RADCLIFF, J., of the Fourth Appellate District, sitting by designation in the place and stead of HERBERT, J.

BELL, J., dissenting. I am in complete agreement with the statements in the majority opinion as to what constitutes contempt of court, and I certainly concur in the observation that the acrimony which developed between the judge and the attorney was unfortunate. A tendency toward an apologetic attitude on the part of both might well have avoided the unfortunate circumstances which resulted in this litigation.

But my interpretation of certain portions of the record herein forces me to a conclusion different from that of the majority of the court. In my opinion there is a sufficient basis in the holdings of this Court to justify the opinion of the attorney that the Common Pleas Court had no jurisdiction of the subject matter. *Grimes & Hauer, Inc., v. Pollock,* 163 Ohio St., 372; *Richman Brothers Co. v. Amalgamated Clothing Workers of America,* 168 Ohio St., 560. Convinced that he had, at least, an arguable issue on the question of the validity of the restraining order, it was his duty as a lawyer to so advise his clients.

The record indicates that, on the day *prior* to the first contempt hearing (the hearing at which the attorney and his clients were found guilty of contempt although no citation in contempt had then been issued for the attorney), the attorney, *at the suggestion of his opposing counsel and with the full knowledge of the court,* agreed to submit to the court his clients to be dealt with on contempt. A that time he stated that he "would gladly stipulate all matters necessary to establish the contempt so that I could immediately appeal the decision or file habeas corpus proceedings."

To subsequently hold him in contempt for actually doing what, with the knowledge of the court and opposing counsel, he had agreed to do appears to me to be carrying

the processes of contempt to an end that is unwarranted in this situation.

Judge Younger, in his dissenting opinion in the Court of Appeals, summed it up thus:

> "In my opinion there is a vast distinction between the actions of an attorney who is openly contumacious or rebellious over an order of court and advises or aids and abets his client in disobeying it and the actions of an attorney who has valid legal grounds for believing the order of the court to be void for lack of jurisdiction and advises his client to resist the order, so that, in the orderly administration of justice, the question of the court's jurisdiction may be determined. This is especially so, where, as in this case, the opposing counsel and the court know what is being done and the reason for it. I would not condone the one and I can not condemn the other."

TAFT, J., concurs in the foregoing dissenting opinion.

APPENDIX B.

OPINION OF THE OHIO COURT OF APPEALS.

PER CURIAM:

This is an original action in habeas corpus filed in this Court on June 7th, 1960. The issuance of the writ of habeas corpus is the outgrowth of an action for an injunction had in a case then pending in the Court of Common Pleas of Lucas County, wherein the Toledo Marine Terminals, Inc., was plaintiff, and various members of the International Longshoremen's Association, a labor organization, were defendants. The record discloses the following pertinent facts in the above styled action: an injunction was sought to enjoin the defendants, among other things, from picketing in any manner the premises of the plaintiff as set forth in the petition. Upon the filing of this petition a temporary restraining order was allowed by the Court as prayed for and bond was set and furnished. In defiance of this restraining order defendants continued with the picketing of plaintiff's premises. As a result of such violation of the restraining order four members of the Longshoremen's Association were cited for contempt of court. A hearing on said contempt charges was held before the Honorable John M. McCabe, Judge of the Court of Common Pleas on June 1st and June 3rd, 1960. The petitioner seeking release by habeas corpus is an attorney at law and appeared as the attorney for the Longshoremen Association in the action out of which the present action grows; that he also appeared as attorney for the four pickets charged with contempt of court at the hearing on June 1st and June 3rd. At this hearing the petitioner in this habeas corpus action was asked—

"The Court: I want them to explain to me why they violated the order of this Court.

Mr. Green: I can—.

The Court: I want them to tell me whether they just did that or whether they were told by someone to do that, I want to know.

Mr. Green: I can advise the Court now that they were told by me."

Upon his admission that he had advised members of the union to continue the picketing of plaintiff's premises in violation of the Court's restraining order the Court found Mr. Green was in contempt of court and he was given until the following Tuesday, June 7th, to purge himself of contempt.

On June 6th the Court filed a written charge against the respondent charging him with contempt of court and set the hearing on said charge for June 7th at 10:30 a.m. At this hearing the respondent appeared, also his counsel, Mr. Merritt W. Green and Mr. Robert Burns, who stated that they were in court pursuant to the order issued to the respondent to appear with counsel to purge himself of contempt of court. Counsel thereupon stated to the court that they were taking the position that the court was without jurisdiction of the subject matter, in the action in which the restraining order was issued. During the hearing on June 7th counsel admitted that the respondent advised the members of the union to violate the restraining order issued by the court. See Record, page 43.

Three legal questions are presented:

First: Did the Court have jurisdiction to issue the restraining order which is the basis of this contempt action?

Second: Did the action of the respondent in advising the violation of the restraining order constitute a contempt of court?

Third: In the hearing upon the written charge against the respondent for contempt of court was due process of law accorded the respondent?

It is the contention of the petitioner that the Common Pleas Court did not have jurisdiction of the subject matter in the original action to issue the restraining order or restrain the picketing of the plaintiff's property, that the subject matter involved was within the exclusive jurisdiction of the National Labor Relations Board. The right of the state Court in the original action to retain jurisdiction and on final hearing to issue an injunction is not raised by this proceeding, and is not decided by the Court. The question involved in this habeas corpus action is the jurisdiction of the state Court to issue the temporary restraining order to preserve existing conditions until such time as the Court could pass upon the question of its jurisdiction. We believe that this question is fully and definitely settled by the decisions of the United States Supreme Court.

In the case of *United States of America v. John F. Shipp, et al.*, 203 U. S. 563, 27 Supreme Court Reporter, it is stated on page 166:

> "But even if the circuit court had no jurisdiction to entertain Johnson's petition, and if this Court had no jurisdiction of the appeal, this Court and this Court alone, could decide that such was the law. It and it alone necessarily had jurisdiction to decide whether the case was properly before it. On that question, at least, it was its duty to permit argument, and to take the time required for such consideration as it might need. Until its judgment declining jurisdiction should be announced, it had authority, from the necessity of the case, to make orders to preserve the existing conditions and the subject of the petition, just as the state court was bound to refrain from further proceedings until the same time."

We find in the first headnote of this case the rule stated as follows:

> "1. Lack of jurisdiction in the Federal circuit court of a petition for habeas corpus, or in the Supreme Court of the appeal from the order denying the writ, does not enable persons to disregard, without liability to process for contempt, the order of the Supreme Court, that 'all proceedings against the appellant be stayed, and the custody of said appellant be retained pending this appeal,' since that court necessarily has jurisdiction to decide whether the case is properly before it."

The rule as laid down in *United States v. Shipp, supra*, is followed in *Carter v. United States*, 135th Federal 2d, 858. In that case the violation of the temporary restraining order was held punishable as criminal contempt pending a decision on the doubtful question of its jurisdiction. The district court was held to have jurisdiction to maintain a status quo by issuing a temporary restraining order and punish a violation of such order as contempt.

The law as stated in the case of *United States v. Shipp, supra*, was followed by the Supreme Court in a case of *United States v. United Mine Workers of America*, 330 U. S., 258. The Court held in the later case that where the district court issued a restraining order to preserve existing conditions pending a decision of its authority to grant injunctive relief in a government suit the defendant's disobedience of the restraining order was punishable as a criminal contempt.

It is the holding of this Court that the Court of Common Pleas had jurisdiction to issue the temporary restraining order restraining picketing of plaintiff's premises.

The second question confronting the Court is whether the act of the petitioner constitutes a criminal contempt. It is recognized that the question here involved is of the

utmost importance to both the Courts and the members of the Bar. *In re Watts*, 190 U. S. 1, 23 Supreme Court Reporter at page 725, Chief Justice Fuller states the rule "in the ordinary case of advice to clients, if an attorney acts in good faith and in the honest belief that his advice is well founded and in the just interests of his client, he cannot be held liable for error in judgment. The preservation of the independence of the Bar is too vital to the due administration of justice to allow of the application of any other general rule."

It will not be questioned that the petitioner was fully within his rights to advise his clients that in his opinion the Common Pleas Court did not have jurisdiction to issue the restraining order and to point out to his clients the legal remedies open to them to raise the question of jurisdiction. When the petitioner went beyond advising his clients as to their legal rights and that the order of the Common Pleas Court in his opinion was invalid and advised them to violate the Court's order, his actions in so advising them ceased to be privileged and he acted at his peril. The act of advising the violation of the Court's order in and of itself constitutes contempt regardless of the good faith or bad faith of the petitioner. The record reveals that the petitioner admitted in open Court that he advised his clients to violate the Court's restraining order. The gist of petitioner's offense was not in advising his clients that the Court was without jurisdiction to issue the restraining order and therefore the order was invalid, but when he proceeds further and without filing any motion or pleading of any kind to test the jurisdiction of the Court advising his clients to ignore the Court's order. This is not a case where the attorney gives wrong advice on a legal proposition. Whether his opinion regarding the Court's jurisdiction was correct or incorrect his duty was to advise his

clients to obey the order and to follow his legal remedies to test such jurisdiction.

In the instant case the conduct of the petitioner was clearly an obstruction to the due administration of justice and therefore the question of his good faith in advising a violation of the restraining order has no application.

The final question to be passed upon by the Court, is whether or not at the hearing on the written charges filed against the petitioner he was denied due process of law. Before discussing the question involved let it be said that this Court does not approve of the manner in which the hearing in the trial court was had. The wrangling appearing in the record which took place between counsel for the petitioner and the court should not be found in an orderly judicial proceeding. However, the duty of this Court is to sift the evidence appearing in the record to see if due process had been afforded the petitioner and to determine whether any rights of the petitioner have been violated to his prejudice. In both the decisions of the United States Supreme Court and the Supreme Court of Ohio it is stated that due process of law involves only the essential rights of notice, hearing or the opportunity to be heard before a competent tribunal. *McKane v. Durstoon*, 153 U. S. 684, 14 Supreme Court Reporter 913, *State v. Edwards*, 157 O. S., 175, *Luff v. State*, 117 O. S., 102.

R. C. Sec. 2705.01 provides that a Court or Judge at chambers may summarily punish a person guilty of misconduct in the presence of or so near the Court or Judge as to obstruct the administration of justice.

It would appear that when the petitioner, an officer of the Court, stated in open Court on June 1st and June 3rd that he advised the pickets to continue their picketing and disobey the restraining order his acts constituted contempt, "in the presence of or so near the Court as to

obstruct the administration of justice." Under such facts it was not necessary to file written charges. However, whether necessary or not, written charges were filed under R. C. Sec. 2705.03 for contempt of court as set forth in sub-section A of R. C. Sec. 2705.02 and a hearing was had on said written charges on June 7th.

The trial court before whom the contempt proceedings was had was also the trial Judge who issued the temporary restraining order which was violated and also the trial court conducting the hearing on June 1st and June 3rd of the pickets charged with contempt. This being true, in the hearing held on June 7th the Judge could take judicial notice of all that transpired in the preceding hearings which were the outgrowth of the injunction action then pending before him. In the hearing on June 7th the court could take judicial notice of the fact that the temporary restraining order restraining picketing was issued; that the restraining order so issued was violated by the continuing of picketing after the restraining order was issued and after those violating the order had notice of the order; that the petitioner as attorney for the respondent at the hearing on June 1st and June 3rd admitted advising them to violate the restraining order.

While there appears in the record contradictory statements of the purpose of the hearing had on June 7th and at times it would appear that the court and counsel were apparently confused and differed as to the matters being discussed, this Court is of the opinion that there appears in the record admissions of guilt of the petitioner in advising his clients to violate the restraining order. This admission of guilt was made by the petitioner at the hearing on June 1st and June 3rd and admission of his guilt in advising the violating of the restraining order was made by his counsel at the hearing on June 7th. The record

does not show the petitioner was denied the opportunity to be sworn and to testify; that his counsel read into the record a complete and detailed statement of what the petitioner would testify to if sworn and testified as a witness. Various parts of this statement made by petitioner's counsel were discussed during the presentation by both petitioner's counsel and the court. The Court find that the petitioner was not denied due process of law at the hearing on June 7th and that there was evidence produced at the hearing of June 1st and June 3rd and also June 7th which supported the finding of the trial court that the petitioner was guilty of contempt of court. Consideration of the evidence produced prior to the filing of written charges was within the sound discretion of the trial court and was not prejudicial to the petitioner. See *North American vs. United Automobile, etc.*, 69 O. L. A. 242, 124 N. E. (2nd) 822.

The Court therefore find that the petitioner has failed in his proof that he is being unlawfully restrained of his liberty. Judgment accordingly.

MIDDLETON, J. and GUERNSEY, J. concur.

YOUNGER, *J. J.* dissents.

It is admitted by all parties here that the plaintiff in the case in which this contempt proceeding arises, The Toledo Marine Terminal, Inc., is engaged in interstate commerce and that the picketing by the defendant members of the International Longshoremen's Association was entirely peaceful and nonviolent.

The Supreme Court of Ohio in *Grimes & Hauer vs. Pollock*, 163 O. S. 372, has held:—

> "Because of the decision of the Supreme Court of the United States in the case of Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776, 346 U. S., 485, where a labor union is in dispute with an employer engaged in interstate commerce over the unionization of the employer's nonunion employees, and the union pickets the business locations of such employer in an orderly and peaceful manner, a state court is without jurisdiction to enjoin the picketing; a controversy of this kind comes within the provisions of the Labor Management Relations Act (Section 151 et seq., Title 29, U. S. Code), as it relates to unfair labor practices; and the employer must, initially at least, pursue the remedy of presenting his grievance to the National Labor Relations Board."

Also in *Richmond Brothers Co. vs. Amalgamated Clothing Workers of America, et al.*, 168 O. S. 560, the Supreme Court held:—

> "Where interstate commerce is involved and a labor union, through its members who are not former or present employees of an employer, engages in nonviolent picketing of such employer's premises to induce the unionization of his employees, the National Labor Relations Act (Section 141 et seq., Title 29, U. S. Code, as amended) has exclusive application, and, by decisions of the Supreme Court of the United States interpreting such act, state courts lack the power and jurisdiction to intervene."

The Court of Appeals of Lucas County in December, 1959, in *Sherlock Baking Company vs. Bakery Drivers Union Local* (unreported) held to the same effect.

In view of the above cases and the decisions of the Supreme Court of the United States upon which they are based, the petitioner, Merritt W. Green II, had a valid legal foundation for his opinion that the Common Pleas Court had no jurisdiction of the subject matter and had a valid arguable issue on the question as to whether or not the restraining order involved herein was void. It was his duty as a lawyer therefore, in my opinion, to so advise the head of the Longshoremen's Union in Chicago and its general counsel in Chicago and such of the individual defendants as might ask him concerning the same.

The record in this matter from its beginning to its end is such that neither the petitioner, his attorneys, nor the trial court have any reason to be proud. It shows a developing clash of personalities, much argument over unimportant or irrelevant matters, a complete forgetting of the main issue and a run away on a tangent. However, there is practically no controversy or dispute over the main facts, and no denial at all over what I consider to be the controlling facts.

As I read this record the decision of the union to continue picketing was made by the top officials and general counsel in Chicago. At page 35 of the June 7th hearing Mr. Green stated as follows:

> "At about 8:00 P. M. Friday evening I received a call from Mr. Friedman who advised me that the union officials had considered the matter in detail and had concluded that on the basis of my report to them that their only possible course was to continue the picketing. I thereupon called the union hall and told them of the decision of the officials and asked them to communicate this information to the pickets."

However it is true that at the hearing before Judge McCabe, in the midst of an exciting hearing and considerable confusion, and in an effort to get down to the business at hand—that of dealing with the contempt of the four pickets which he had voluntarily brought into court—Mr. Green did, big-heartedly and, in my opinion, contrary to the record, assume such responsibility.

The acceptance of this responsibility was a direct result of a conference and a firm agreement reached in Judge McCabe's office on May 31st between Mr. Green, Mr. Ragan (the opposing counsel) and Judge McCabe, as set forth by the following on pages 37-39 of the June 7th hearing and which is not denied:

> "Mr. Ragan opened the discussion and he and the Judge talked for some time during which conversation the court concluded that it did not intend to reform the contract. Feeling it necessary to advise the court of my position on the jurisdictional matter involved I interrupted the conversation and asked if I could say a few words, a request Judge McCabe graciously granted. I attempted to explain the matter to him pointing out that I was there only to object to the jurisdiction of the court and that my prime interest was to have the matter heard so that we could either appeal it to get it before the N. L. R. B. or get it where it belonged. Judge McCabe suggested that I was obsessed with this point and Mr. Ragan suggested that I file a motion to vacate the restraining order.
>
> The Court: "That's right.
>
> Mr. Green: "I thereupon told the Court that I had a motion to vacate prepared and would gladly file it immediately if I could obtain an early hearing. The court flatly refused saying that he would not hear the motion until the restraining order was obeyed. I

then asked Judge McCabe that if the restraining order was obeyed would it be possible to obtain a hearing within the week and he replied that it would not.

"Mr. Ragan then suggested that as an alternative that I agree to submit to the court the four signators of the agreement to be dealt with on contempt. After some discussion I agreed to do so and stated to both Judge McCabe and Mr. Ragan that I would gladly stipulate all matters necessary to establish the contempt so that I could immediately appeal the decision or file habeas corpus proceedings. (Emphasis added.)

"The entire atmosphere of the meeting was light and agreeable and I was convinced that both the Judge and Mr. Ragan were aware that I had consented to bring these men before the court and stipulate the essential matters for the express purpose of testing the validity of the court's order and its jurisdiction over the subject matter. So far as I was concerned the matter was clear cut and the hearing the following day was to be short and to the point. To that end I prepared the necessary habeas corpus proceedings."

The following day, June 1st, all of the above parties appeared in court as agreed upon and the petitioner was accompanied by the four pickets he had agreed to produce. However, the hearing deteriorated into a wrangle as to the court's jurisdiction to issue the restraining order, the propriety of the court's refusal to grant a hearing to the defendants either before or after issuing the order, the failure to file a motion to dissolve the restraining order and many other matters, notwithstanding the business at hand was the alleged contempt of the four defendants as agreed upon the day before.

The record does show however that at one point Mr. Green addressed the court as follows:

"Mr. Green: You are sure you could not cite them for contempt now, Your Honor? The only thing I want here is that these parties may be thrown in jail and get them out on habeas corpus?"

An adjournment was taken to Friday, June 3rd, when evidence was submitted showing that the picketing was still continuing but no finding was made as to the guilt or innocence of the four defendants. In fact they were completely forgotten and the petitioner as their attorney was then charged with contempt and the matter adjourned to June 7th.

It was never established by any evidence whether the four pickets acted upon the advice of the petitioner Mr. Green, the top officials of the union in Chicago, the general counsel in Chicago, or any one else.

The real reason why these four defendants were not sentenced and sent to jail so that the whole thing could be tested by habeas corpus as agreed upon the day before remains, to me, a mystery.

In my opinion there is a vast distinction between the actions of an attorney who is openly contumacious or rebellious over an order of Court and advises or aids and abets his client in disobeying it and the actions of an attorney who has valid legal ground for believeing the order of the Court to be void for lack of jurisdiction and advises his client to resist the order, so that, in the orderly administration of justice, the question of the Court's jurisdiction may be determined. This is especially so, where, as in this case, the opposing counsel and the Court know what is being done and the reason for it. I would not condone the one and I can not condemn the other.

I can not conscientiously vote to find the petitioner guilty of contempt under these circumstances and I therefore dissent.

APPENDIX C.

JUDGMENT OF THE SUPREME COURT OF OHIO.

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Lucas County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the judgment of the said Court of Appeals be, and the same is hereby, affirmed; and it appearing to the Court that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended taxed at $_____.

ORDERED, That a special mandate be sent to the Court of Appeals of Lucas County, to carry this Judgment into Execution.

APPENDIX D.

REVISED CODE OF OHIO.

Sec. 2705.02 *Acts in contempt of court*:

"A person guilty of any of the following acts may be punished as for a contempt:

"(A) Disobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or an officer;"

* * *

* * *

Sec. 2705.03 *Hearing*:

"In cases under Section 2705.02 of the Revised Code, a charge in writing shall be filed with the clerk of the court, an entry thereof made upon the journal, and an opportunity given to the accused to be heard, by himself or counsel. This section does not prevent the court from issuing process to bring the accused into court, or from holding him in custody, pending such proceedings."

Sec. 2705.05 *Trial*:

"Upon the day fixed for the trial in a contempt proceeding the court shall investigate the charge, and hear any answer or testimony which the accused makes or offers.

"The court shall then determine whether the accused is guilty of the contempt charge. If it is found that he is guilty, he may be fined not more than Five Hundred Dollars or imprisoned not more than ten days, or both."

Sec. 2727.03 *Courts authorized to grant injunctions*:

"At the beginning of an action, or any time before judgment, an injunction may be granted by the supreme court or a judge thereof, the court of appeals or a judge thereof in his district, the court of common pleas or a judge thereof in his county, or the probate

court in causes pending therein, when it appears to the court or judge by affidavit of the plaintiff, or his agent, that the plaintiff is entitled to an injunction."

* * *

Sec. 2727.06 *Notice of application*:

"If, in the opinion of the court or judge, the defendant or a party to the suit should be heard before granting an injunction, a reasonable notice may be required to be given to such party of the time, place, and purpose of the application for the injunction. Such party in the meantime may be restrained."

* * *

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In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 312.

IN THE MATTER OF THE PETITION FOR A WRIT OF HABEAS CORPUS FOR MERRITT W. GREEN II.

BRIEF OF RESPONDENT, LUCAS COUNTY, OHIO,

In Opposition To Petition For A Writ of Certiorari To The Supreme Court of Ohio.

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Constitution.

No portion of the Constitution of the United States is quoted specifically in this Brief. Those portions which the petitioner quotes in his Petition for a Writ of Certiorari to the Supreme Court of Ohio are incorporated herein by reference ---- 1

Reference is made in this Brief to Amendment XIV, sec. 1 ---- 2

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No other statute is quoted specifically in this Brief. Those quoted by the petitioner in his Petition for a Writ of Certiorari to the Supreme Court of Ohio are incorporated herein by reference---- 1

In the Supreme Court of the United States

OCTOBER TERM, 1961.

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IN THE MATTER OF THE PETITION FOR A WRIT OF HABEAS CORPUS FOR MERRITT W. GREEN II.

BRIEF OF RESPONDENT, LUCAS COUNTY, OHIO, In Opposition To Petition For A Writ of Certiorari To The Supreme Court of Ohio.

REPORTS OF OPINIONS IN LOWER COURTS.

The opinion of the Supreme Court of Ohio, in addition to being printed in 172 Ohio State at page 269, is also printed in 175 Northeastern Reporter, Second Series, page 59 and in 15 Ohio Opinions, Second Series, page 449.

STATEMENT OF JURISDICTION.

The respondent adopts and incorporates herein by reference the Statement of Jurisdiction as printed on pages 1 to 2 of the petitioner's Petition for a Writ of Certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The respondent adopts and incorporates herein by reference that portion of the petitioner's Petition for a Writ of Certiorari which is included under the heading, "Constitutional Provisions and Statute Involved," on pages 3 and 4 of such Petition. In addition, the respondent cites that portion of 28 United States Code 1257 (Act of June 25, 1948, c. 646, sec. 1) which reads as follows, namely,

"1257. STATE COURTS—APPEAL—CERTIORARI.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court, as follows:

(3) By writ of certiorari. * * *"

QUESTIONS PRESENTED FOR REVIEW.

1. Was the petitioner, an attorney, denied due process of law when he was convicted of contempt of court, and sentenced therefor, for advising his clients to violate an *ex parte* temporary restraining order, issued by a State trial court, which prohibited picketing by employees at the premises of an employer in violation of the "no Picketing" clause in a collective bargaining contract?

2. Did the State trial court, when it so convicted and sentenced the petitioner for contempt of court, act in so arbitrary and unfair a manner as to violate the "Due Process" clause of the Fourteenth Amendment to the Constitution of the United States?

3. Was the State trial court deprived of its jurisdiction to enjoin the violation of a "no picketing" clause in a collective bargaining contract simply because an "unfair labor practices" charge, having nothing to do with such contract had been filed with the National Labor Relations Board?

STATEMENT OF THE CASE.

The respondent adopts and incorporates herein by reference the "Statement of the Case" which is printed on pages 4 through 16 of the Petition for a Writ of Certiorari herein, subject, however, to the following emendations:

1. After the trial court had issued an *ex parte* restraining order (R. 3, 5, 14, 15, 20, 22, 45-57) which forbade the clients of the petitioner to violate a "no picket-

ing" clause in a collective bargaining contract, the petitioner told his clients that in his opinion such restraining order was illegal *and he also advised his clients to disobey the restraining order* (R. 28, 29, 30, 33). In earlier hearings upon this case, both the Ohio Supreme Court (Appendix A to Petition for a Writ of Certiorari herein, page 36) and the Ohio Court of Appeals (Appendix B to same Petition, page 43), recognied this fact that the petitioner had not only advised his clients as to their rights, but had also advised his clients to disobey the court order. After the officials of the union, acting upon advice of the petitioner, decided to violate the restraining order, the petitioner himself called the union hall and told them of the decision of the officials and asked them to communicate this information to the pickets (R. 50, bottom paragraph).

2. The petitioner, on May 31, 1960, told the trial court that he, the petitioner, had prepared a motion to vacate the temporary restraining order but he refused to file it unless the court would grant him an early hearing upon such motion (R. 53).

3. The "unfair labor practices" charge which had been filed with the National Labor Relations Board contained vague charges that the employer had refused to bargain collectively, although in fact negotiations had been under way almost continuously (R. 4). Such "unfair labor practices" charge was not based upon the collective bargaining agreement between the employer and the clients of the petitioner (R. 4). Such charge was dropped prior to the Ohio Court of Appeals hearing on June 9, 1960 (R. 3, 4).

4. The trial court, on Friday, June 3, 1960, told the petitioner that he ought to select a lawyer to represent him and that if the petitioner did not do so, the trial court would appoint such an attorney (R. 34, 35).

5. Although the trial court refused to permit the petitioner to testify under oath (R. 42), the trial court permitted the petitioner's lawyer to read into the record what the petitioner would testify if allowed to testify under oath (R. 43 through 54).

ARGUMENT.

I.

Since the National Labor Relations Board has never been given authority to enforce a collective bargaining contract, the mere existence before the National Labor Relations Board of an unfair labor practices charge did not deprive a state court of jurisdiction to enforce a "no picketing" clause in such a contract.

"It is significant, however, that breach of contract is not an 'unfair labor practice.' A proposal to that end was contained in the Senate bill, but was deleted in conference with the observation: 'Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board' (H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 42)." *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation*, 348 U. S. 437, footnote 2 on pages 443-444.

A State court may enjoin the violation of a "no picketing" clause in a collective bargaining agreement. *McLean Distributing Co. v. Brewery & Beverage Drivers Local*, 254 Minn. 204, 94 N. W. 2d 514; certiorari denied, 360 U. S. 917.

II.

Since the Trial Court had the right to determine its own jurisdiction when it issued the temporary restraining order, the petitioner was obliged to obey such order even if such order eventually proved to be beyond the jurisdiction of the court.

The leading case on this point is *United States v. Shipp*, 203 U. S. 563. On page 573, this Court therein said:

> "But even if the Circuit Court had no jurisdiction to entertain Johnson's petition, and if this court had no jurisdiction of the appeal, this court, and this court alone, could decide that such was the case. It and it alone necessarily had jurisdiction to decide whether the case was properly before it. * * * Until its judgment declining jurisdiction should be announced, it had authority from the necessity of the case to make orders to preserve the existing conditions and the subject of the petition. * * *"

After the *Shipp* case, this Court reiterated the rule that a court has authority to decide whether it has jurisdiction in this kind of a situation; and that pending such decision people must obey its orders. *Toy Toy v. Hopkins*, 212 U. S. 542, 548; *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 450; *Howat v. Kansas*, 258 U. S. 181. In the *Howat* case, this doctrine was spelled out even more clearly in the following words beginning on page 189,

> "An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going

to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished."

Again, in 1947, in *United States v. United Mine Workers of America*, 330 U. S. 258, this Court restated the above rule and repeated the above quotations from the *Shipp* case (page 291) and the *Howat* case (page 293).

III.

Since a temporary restraining order, even though affirmed by the highest court of a state, is not a "final judgment or decree" which may be reviewed by this Court pursuant to 28 U. S. C. 1257, it is improper for the petitioner to attack the validity of such temporary restraining order at the present time in this Court.

28 U. S. C. 1257 (Act of June 25, 1948, c. 646, sec. 1, 62 Stat. 929) provides that "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari * * *."

Since the time of *Gibbons v. Ogden*, 6 Wheaton, 448, this Court has refused to accept jurisdiction of interlocutory decrees, since they are not "final decrees" within the terms of 28 U. S. C. 1257. In 1952, this Court said:

"The distinction between a preliminary or temporary injunction and a final or permanent injunction was elementary in the law of equity. The classical concept was at once recognized and applied in *Gib-*

bons v. Ogden, supra. There is no room here for interpretation. The rule remains unchanged.

"True, as long as a temporary injunction is in force it may be as effective as a permanent injunction, and for that reason appeals from interlocutory judgments have been authorized by state legislatures and Congress. But such authorization does not give interlocutory judgments the aspect of finality here, even though we may have inadvertently granted certiorari."

Montgomery Building & Construction Trades Council et al. v. Ledbetter Erection Co., Inc., 344 U. S. 178, 180.

In the present instance, the order issued by the trial court was a temporary restraining order (R. 3, 5, 14, 15, 20, 22, 45, 46, 47). Therefore it is not reviewable by this Court. This Court ought not to hear any argument which the petitioner may seek to make as to the validity of such temporary restraining order.

IV.

Since the petitioner was given all of the safeguards enumerated in In re Oliver, 333 U. S. 257, and relied upon by the petitioner on page 20 of his petition for a writ of certiorari, he was not deprived of any of his constitutional rights in being convicted of contempt by the State Trial Court.

On page 20 of his petition, the petitioner cites *In re Oliver*, 333 U. S. 257, the Michigan "One Man Grand Jury" case, wherein this Court said that a defendant in indirect contempt proceedings is guaranteed

(1) The right to reasonable notice;

(2) The right to a trial. (Actually in *In re Oliver*

the Court said that he was entitled to a *public* trial as distinct from one conducted privately.);

(3) A reasonable opportunity to defend himself;

(4) The right to testify and be heard in his defense; and

(5) The right to examine witnesses.

The petitioner was not deprived of any of these rights.

(1) He had reasonable notice. Throughout the entire period from May 27, 1960 through June 7, 1960, the petitioner was fully aware of what was being done in the Lucas County, Ohio, Trial Court. He knew about the temporary restraining order which forbade his clients to violate a "no picketing" clause in their own collective bargaining contract. He knew what he was doing when he advised them to violate such order (R. 28, 29, 30, 33, 36).

(2) He had public hearings on June 1, June 3 and June 7 which constituted in substance a trial for his offense of contempt of court.

(3) He had throughout such hearings a reasonable opportunity to defend himself. In fact the trial court told him that he ought to be represented by counsel and that if he did not select a counsel, the trial court would appoint one (R. 34, 35).

(4) Any objection which the petitioner might have had to the refusal of the trial court to permit him to testify under oath (R. 42) was waived when his counsel asked leave to read, and was allowed to read, into the record what the petitioner would have testified had he been allowed to take the stand (R. 43 through 54).

(5) There is not the slightest reason to assume that the petitioner would not have been allowed to examine witnesses if any had been called. No witnesses in the contempt proceedings were called since the petitioner, in such proceedings in open court, freely admitted that he had advised his clients to disregard the temporary restraining order which forbade them to violate a "no picketing" clause in their own collective bargaining contract (R. 28, 29, 30, 33).

The Ohio Court of Appeals and the Ohio Supreme Court both considered at length the matter of the petitioner's constitutional rights. Both courts agreed that such rights had not been violated (Appendices A and B to petitioner's Petition for a Writ of Certiorari, pages 31 (Ohio Supreme Court) and 41 (Ohio Court of Appeals)).

V.

This case is important only to the individual involved and has no general importance; and it was decided justly by two Ohio courts of appellate jurisdiction.

This case turns upon a peculiar factual situation. It is not of general importance. It is important only to the petitioner as an individual. It does not concern the National Labor Relations Board in any way. Even before the hearing in the Ohio Court of Appeals on June 9, 1960, the "unfair labor practices" charge had already been dismissed (R. 3, 4). A search of the authorities has failed to disclose a case where the facts presented are similar to those in the instant case. Therefore this case is not important to the profession as a whole. The record shows that the petitioner deliberately and knowingly elected to take a short-cut rather than to take the longer but more conventional path

(R. 28, 29, 30, 33, 36). He had prepared a motion to vacate the preliminary restraining order but did not file it because the trial court would not promise him an early hearing (R. 53). In his impatience, the petitioner elected to advise his clients to disobey that which in fact proved to be a valid order. In addition he served as a link in the chain of communication by which the decision of the heads of the labor union to disobey the order was transmitted to the local members (R. 50). These acts of his were clearly contemptuous.

The decision of the Ohio Supreme Court was right and just when it affirmed the decisions of the lower courts. Each of the two Ohio appellate courts carefully considered the matter of the petitioner's constitutional rights. He argued before each court in turn that he had been deprived of due process. Each court after careful study decided that there was no merit in his contention. Even the dissenting judges did not question the fact that the petitioner's constitutional rights had been protected (Appendices A and B to Petition For a Writ of Certiorari, pages 37-38 and 47-51 respectively). Neither of the dissenting judges indicated that there was any merit in the claim of the petitioner that he had been deprived of due process. This Court should not upset the decision of the Ohio Supreme Court.

CONCLUSION.

SINCE:

The jurisdiction of the State trial court to issue this temporary restraining order which the petitioner advised his clients to disobey was never taken away from such court and vested in the National Labor Relations Board;

The trial court had the right to determine its own jurisdiction when it issued the temporary restraining order which the petitioner advised his clients to disobey;

A temporary restraining order is not a final decree and therefore may not be reviewed by this Court pursuant to 28 U. S. C. 1257;

The manner wherein the State trial court found the petitioner to be guilty of contempt of court and imposed sentence upon him, did not violate any of the rights of the petitioner under the Constitution of the United States;

This case lacks general importance; and

The Supreme Court of Ohio acted fairly and justly in sustaining this conviction of contempt of court;

THEREFORE the prayer of the petitioner for the granting of a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 312.

IN THE MATTER OF THE PETITION FOR A WRIT OF HABEAS CORPUS FOR MERRITT W. GREEN II,

MERRITT W. GREEN II,

Petitioner.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF OF PETITIONER.

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In the Supreme Court of the United States

OCTOBER TERM, 1961.

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IN THE MATTER OF THE PETITION FOR A WRIT OF HABEAS CORPUS FOR MERRITT W. GREEN II,

MERRITT W. GREEN II,

Petitioner.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF OF PETITIONER.

OPINIONS BELOW.

The opinion of the Supreme Court of Ohio is reported in 172 Ohio State, at page 269. (R. 63.) The opinion of the Ohio Court of Appeals is unreported. (R. 48.) It can be found at 47 L. R. R. M. 2230.

JURISDICTION.

The judgment of The Supreme Court of Ohio was entered as of May 17, 1961. (R. 61.) There was no motion for rehearing.

A petition for a writ of certiorari to the Supreme Court of Ohio was docketed in this Court on August 14, 1961. The petition for certiorari was granted on November 6, 1961. (R. 71.) This Court's jurisdiction rests on 28 U. S. C. Sec. 1257 (3), inasmuch as the Ohio Courts have denied petitioner rights and privileges under federal statutes and have also denied rights and claims of the petitioner guaranteed under the Constitution of the United States.

QUESTIONS PRESENTED.

May a state court circumvent the supremacy clause of the federal constitution by the device of issuing an ex parte temporary injunction in a labor dispute affecting interstate commerce preventing a labor organization from engaging in activities protected by the Labor-Management Relations Act and then summarily refusing to set or hold a hearing on the question of the jurisdiction of the court over the subject matter of the action and punishing the union's lawyer for advising his client that the court acted beyond its jurisdiction in granting the injunction?

May a state court issue an ex parte temporary injunction prohibiting peaceful picketing in a labor dispute affecting interstate commerce solely on the basis of a petition which does not allege acts of violence or conduct likely to produce violence, mass picketing, threats, intimidation, any kind of disorder or breach of the peace arising from the picketing of the employer's premises, but alleges only a conclusion that to permit picketing to continue "will result in danger to life and limb of the employees of the plaintiff's company and irreparable loss and damage to property of the plaintiff's company and that the plaintiff has no adequate remedy at law"?

Is a lawyer who in good faith advises his client that a state court was without jurisdiction to issue an ex parte injunction prohibiting peaceful picketing by employees at the premises of an employer engaged in interstate commerce, denied due process of law and equal protection of the laws by the refusal of the trial court to grant him a trial or permit him to give testimony, call witnesses, or otherwise answer a written charge of *indirect* contempt lodged against him *by the trial Judge* for giving such advice?

Is an attorney denied due process of law when he is convicted of contempt of court for proffering good faith advice to his clients that a violation of an ex parte temporary injunction provided a means of testing the jurisdiction of the state court over the subject matter?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED.

The constitutional provisions involved are that portion of Section 1 of the 14th Amendment to the Constitution of the United States which reads as follows:

> "* * *; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

And that portion of Article VI of the United States Constitution which reads as follows:

> "* * * This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in Constitution or Laws of any State to the Contrary notwithstanding."

The statutory provisions involved in this case are those contained in Sections 7 and 8 (157 and 158) of the Labor-Management Relations Act of 1947, as amended, 29 U. S. C. A. 141 et seq., and that portion of Section 10 (a) (160) of the Act which reads as follows:

> "The Board is empowered as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *"

STATEMENT OF THE CASE.

1. Petitioner Cited for Indirect Contempt for Advising Client.

The petitioner is a young Toledo lawyer, a member of the Bar of Ohio. He was cited for an indirect contempt of court and was sentenced to a term in jail and to pay a fine without being afforded a hearing or trial.

The charges of contempt arose out of the petitioner advising the regional counsel of a labor union that an ex parte temporary injunction issued by a Judge of the Court of Common Pleas of Lucas County, Ohio, was, in his opinion, a nullity for the reason that the state court did not have jurisdiction over the subject matter of the action and that, in view of the adamant refusal of the issuing court to grant a hearing, the order could be tested quickly on an application to a higher court for a writ of habeas corpus if picketing continued and the pickets were held in contempt by reason thereof.

The charges of indirect contempt were filed against the petitioner on June 6, 1960 (R. 29). This was several days after the court had pronounced the petitioner to be in contempt during the process of a contempt hearing which involved *only* union officers for violation of a temporary injunction. (R. 25, 28.)

On the day *prior* to the first contempt hearing (the hearing at which the petitioner and his clients were found guilty of contempt although no citation or charge in contempt had been issued for the petitioner), the petitioner, *at the suggestion of his opposing counsel and with full knowledge of the Court*, agreed to submit his clients to the court to be dealt with on contempt. At that time he stated that he "would gladly stipulate all matters necessary to establish the contempt so that I could immediately appeal the decision or file habeas corpus proceedings." (R. 43, 57, 70.)

The petitioner was not a respondent or otherwise a party at the contempt hearings on June 1st or June 3rd but was serving as counsel for the officers of the local union who were produced in court pursuant to the agreement (R. 16, 17, 70.)

These background facts are pertinent:

Friday, May 27, 1960, was the Friday before the Memorial Day holiday, which fell on Monday.

That morning the petitioner was retained by the International Longshoreman's Association, a labor organization having a regional headquarters in Chicago, to represent the local union in Toledo. (R. 36.) Its members were involved in a labor dispute with the Toledo Marine Terminal, Inc. The members, employees of the Terminal Company, were then engaged in peaceful picketing of the premises of the employer. (R. 2.)

2. Ex Parte Injunction Prohibits Peaceful Picketing.

There is no dispute that the employer was engaged in interstate commerce and that the picketing by the union members was in all respects orderly and peaceful. (R. 2, 5.) [1]

Upon being retained, the petitioner contacted Robert Ragan, counsel for the Toledo Marine Terminal, Inc. to advise him that he was representing the union. (R. 36.)

That afternoon the petitioner was notified, *not by counsel* but by the court clerk's office, that an action for

---

[1] Judge Younger at the start of his Ohio Court of Appeals dissenting opinion said (R. 55):

"It is admitted by all parties here that the plaintiff in the case in which this contempt proceeding arises, The Toledo Marine Terminal, Inc., is engaged in interstate commerce and that the picketing by the defendant members of the International Longshoremen's Association was entirely peaceful and non-violent."

injunction had been filed and had been assigned to Judge McCabe. The petitioner immediately talked to Judge McCabe by phone. He informed Judge McCabe that he represented the union and that if a request was made for an immediate injunction, he would be available for a hearing upon a moment's notice and requested to be called in such an event. *He was assured that he would be called if such a request was made.* (R. 23, 37.)

He waited in his office for such a call. *None came from the Judge or from opposing counsel.* Instead, he learned later from a call by a courthouse employee that a temporary injunction had been issued. (R. 38.)

Upon hearing of this unexpected, if not strange, turn of events, the petitioner and his associate met with the court in chambers. The following is a portion of the record of what then took place. (R. 38. Undisputed sworn testimony given Court of Appeals at Habeas Corpus hearing):

> "* * * I told him I would like to have a hearing on the issuance of the restraining order. *He said definitely and flatly that I was not going to have a hearing,* that Mr. Ragan had told him that everyone was happy with the contract and that some hoodlums from Detroit had come to Toledo and forced them to go back on strike and he wasn't going to let these outsiders come down here and push us around. *I protested that these were not the facts* and that the position of the union was that the persons who signed the agreement had no authority to do so *and further suggested that the court had no jurisdiction. He again said that I was not going to get a hearing on the matter and that he would make a little jurisdiction.*
>
> *"I told him that I was entitled to an immediate hearing on the matter particularly in view of the question of jurisdiction and he replied that he did not have time and that I would have to wait my turn."*
> (Emphasis ours.)

The Judge was informed that the petition *had not* asked for a restraining order pending a hearing on a temporary injunction[2] but had prayed for only a temporary injunction and that he had issued a temporary injunction.[3] In reply to this the Judge said (R. 39):

> "He replied that he did not read the petition very carefully and could not really say what it was all about but felt that he could take Mr. Ragan's word for the contents and again said that he did not have time to set the matter down for hearing, either now or in the future."

Had the court examined the petition filed by the employer (R. 8) before issuing the ex parte injunction instead of relying on statements of the plaintiff's counsel, or had the court honored the assurance given the petitioner that he would be notified if a temporary order was requested or conducted the inquiry suggested as being proper by the Canons of Judicial Ethics relating to the issuance of ex parte injunctions,[4] the court would have learned these facts:

---

[2] Under Ohio law (Section 2727.06 R. C.) restraining orders are permissible only when a court sets a motion for a temporary injunction for hearing, in which event a restraining order may issue pending the hearing for the temporary injunction. Here no such hearing was set.

[3] Throughout the proceedings the court considered the order as a temporary injunction. At page 17 of the Record the court said "* * *, this court granted the temporary injunction." At page 26 of the Record: The Court: "Well, we will take first things first. First, of course, will be the violation of the temporary injunction." At R. 30, "This Court at that time (May 27) granted a temporary restraining order—a temporary injunction."

[4] Canon 16: Ex parte Applications.

A judge should discourage ex parte hearings of applications for injunctions and receiverships where the order may work detriment to absent parties; he should act upon such ex parte applications only where the necessity for quick action is clearly shown; if this be demonstrated, then he should endeavor to counteract the effect of the absence of opposing counsel by a

(Continued on following page)

3. Lack of State Court Jurisdiction Apparent; Court Again Refuses to Set Issue for Hearing.

(a) An unfair labor practice had been filed with the National Labor Relations Board charging the employer with refusal to bargain in good faith. (R. 3, 19.)

(b) Interstate commerce was involved. (R. 2, 55.)

(c) The "contract" which was the basis of the injunction action *was not* a completed contract. (R. 15.)

(d) A labor dispute was then in existence and negotiations for settlement were in progress. (R. 3, 10.)

(e) Peaceful picketing was in progress (R. 2, 5, 55).

Instead of resorting to Detroit hoodlums to "make a little jurisdiction" (R. 38) the court would have been able to discern that the conduct sought to be enjoined was arguably or potentially subject to the provisions of the Labor-Management Relations Act of 1947, as amended.

The Judge absolutely refused permission for another Judge to hear the matter. (R. 39.) (In Lucas County when a case is filed it is assigned to a Judge and stays with that Judge for determination of all matters from the be-

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(Continued from preceding page)

scrupulous cross-examination and investigation as to the facts and the principles of law on which the application is based, granting relief only when fully satisfied that the law permits it and the emergency demands it. He should remember that an injunction is a limitation upon the freedom of action of defendants and should not be granted lightly or inadvisedly. One applying for such relief must sustain the burden of showing clearly its necessity and this burden is increased in the absence of the party whose freedom of action is sought to be restrained even though only temporarily.

ginning to the end of the lawsuit.) He did (R. 40), after a great deal of urging, agree to have Mr. Ragan, attorney for the plaintiff, appear that afternoon for a hearing on the question of the court's jurisdiction. The Judge assured the petitioner that he would contact him as soon as Mr. Ragan was contacted.

Again not hearing from the Judge, the petitioner called him at 4:00 o'clock that afternoon. This is what took place (R. 40):

> "Judge McCabe said that he had contacted Mr. Ragan but that he was about to leave and did not intend to hold night court. I requested that he hear the matter on Saturday and he stated that he would not be in over the weekend. I requested a hearing on Tuesday (Monday being a holiday) but he declared that he had a trial on that day and further said that it looked like the rest of his week was filled."

4. Client Informed of Court's Refusal to Act; Union Officials Decide to Test Jurisdiction Issue.

Convinced that Judge McCabe had no intention of granting a hearing, the petitioner and his associate consulted the authorities and concluded that an order made by a court in a matter over which it had no jurisdiction is void and contempt could not be predicated thereon. On the basis of this conclusion the petitioner called Mr. Friedman, regional counsel for the International Union, in Chicago where strike negotiations were then being conducted, and advised him of the status of the matter (R. 41):

> "* * * I explained to him that though it was possible to file a motion to vacate or demurrer to the petition that it was apparent from the actions of the court that such a motion would not be set down for hearing in the near future and that even if it were, an adverse ruling, which seemed most likely in view of

the court's attitude, would not be a final order and could not be appealed.[5] I then told him that if we were correct on the law that the order of the court was wholly invalid, then the only alternative would be to defy the order of the court in the hope that Mr. Ragan would file contempt proceedings which undoubtedly would be heard immediately and from which we could instantly appeal to the Court of Appeals to determine the jurisdiction of the court.

"Mr. Friedman said that he would have to take the matter up with the officials of the union and that he would contact me later in the evening * * *"

"At about 8:00 P. M. Friday evening I received a call from Mr. Friedman who advised me that the union officials had considered the matter in detail and had concluded that on the basis of my report to them that their only possible course was to continue to picket. I thereupon called the union hall and told them of the decision of the officials and asked them to communicate this information to the pickets."

(The alleged acts of contempt on the part of the lawyer-petitioner were confined to those at 4:00 o'clock Friday afternoon when he talked by phone with the union's counsel in Chicago, giving the above quoted advice to the union's regional counsel.) (R. 41.)

Upon instructions from the union officials in Chicago some peaceful picketing continued at the premises. As a result, the employer filed an affidavit of contempt on May 31, 1960, naming one union member. (R. 16.)[6] That ended the first phase of the case.

---

[5] Temporary orders are not appealable in Ohio.

[6] The contempt charged to the union officers was based on Ohio Revised Code Section 2727.12 which provides: "Upon being satisfied, by affidavit, of the breach of an injunction or restraining order, the court or judge who issued such injunction or order may issue an attachment against the guilty party who shall pay a fine of not more than two hundred dollars, * * *."

5. Court Agrees With Procedure to Hear Union Contempt Charge; Agreement Ignored.

The second phase of this case started Tuesday afternoon, May 31, 1960, in chambers, when the court, the petitioner and counsel for the employer discussed procedure to be followed in contempt proceedings involving the pickets. First the petitioner told the court (R. 43) that he had a motion to vacate the temporary injunction prepared and would file it immediately if he could obtain an early hearing. The court not only flatly refused but declared that it would be impossible to obtain a hearing within the week. Then the following arrangement was entered into:

> "Mr. Ragan then suggested that as an alternative that I agree to submit to the court the four signators of the agreement to be dealt with on contempt. After some discussion I agreed to do so and stated to both Judge McCabe and Mr. Ragan that I would gladly stipulate all matters necessary to establish the contempt so that I could immediately appeal the decision or file habeas corpus proceedings.
>
> "* * * I was convinced that both the Judge and Mr. Ragan were aware that I had consented to bring these men before the court and stipulate the essential matters for the express purpose of testing the validity of the court's order and its jurisdiction over the subject matter. So far as I was concerned, the matter was clear cut and the hearing the following day was to be short and to the point. To that end I prepared the necessary habeas corpus proceedings."

The next day, June 1st, the petitioner produced the four men in court as agreed, and after stipulating picketing had continued (R. 19) the petitioner went on to advise the court as follows:

> "I don't think any discussion would be fruitful except to show that this matter has been brought to the

attention of the National Labor Relations Board; an unfair labor practice charge has been filed against the employers for failing to bargain faithfully; that matter has been docketed in Cleveland, No. D-C-A 2168; as we had indicated before, in our discussion before * * *, we felt that when an order is made by a court which lacks jurisdiction over the subject matter of the action, it could not be a valid order, therefore, no process for contempt can issue in the face of its invalidity. We charge that this Court does not have jurisdiction by virtue of the fact that the National Labor Relations Act has been amended, and, since 1947, reposes the entire jurisdiction over this matter in the National Labor Relations Board, that this clause of a collective contract which has been violated, if we take the statements of the employer as correct, has been violated by the picketing and this picketing ensued without the necessary notification being given * * *."

Ignoring the fact that the procedure they had just been through was one agreed upon in the court's chambers the day before, the court then lectured the union people at length on the sanctity of the contract, apparently assuming that the action was based on a valid contract and enforceable in that court, and then demanded to know of the men in court why they had violated the order of the court or whether they were told by someone to do that. It was then that the court held the men to be in contempt and gave them until 10:00 A. M. Friday (two days later) to purge themselves (R. 22).

During the course of the questioning of the men by the court, the petitioner spoke up and said, "I can advise the court now that they were told by me." The petitioner then went on to explain the circumstances under which and to whom the advice was given (R. 23):

"Mr. Green: If the court will just allow me to recall for both the attorneys for the Toledo Marine Terminals and for the court and for myself some of the proceedings that have led up to this incident, I will. In the first place, an order was placed, an injunction was placed ex parte against this union.

The Court: That's right.

Mr. Green: Last Friday morning. This was after I had called you and asked you specifically to have a hearing.

The Court: I am not going into that at all.

Mr. Green: Let me explain, Your Honor, I think I can explain why, at least I can tell you in sequence why we have resulted in having to be here before you now in a contempt proceeding. Now, then, I came to you that same day and asked you if we would have a hearing, and you told me that there would be no hearing on this matter; you later suggested that if I could get Mr. Ragan to agree to a hearing on the injunction which was already issued—

The Court: That's right.

Mr. Green: —that you would have a hearing. Now, we couldn't get in touch with Mr. Ragan; it seemed very questionable that Mr. Ragan after once having had his day in court and having received what he wanted, would come back in here for a hearing on this matter; that afternoon at four o'clock you refused to have a hearing because you felt it was too late. I asked you whether we could have it on Tuesday, and you said "No." You also told me that you did not feel that any other court in this building could hear the matter even on the jurisdictional question; I don't mean on the contempt but only on the jurisdictional question. I was also told that on Tuesday you could not hear it and it was likely I wasn't going to get a hearing the rest of the week.

* * * * *

Mr. Green: I had only two ways to go at it; let me say this, that this Court had no jurisdiction—

The Court: That is beside the point.

Mr. Green: And consequently a contempt on the basis of an invalid order cannot stand.

The Court: That is beside the point.

Mr. Green: Well, it is not beside the point.

The Court: You could at least obey the order of the court and then come in and express whatever criticism you had and purge yourself.

Mr. Green: There were only two ways we could do this.

The Court: You could wait until we had a final hearing on the entire matter; that was the only way you could have done it; you could obey the order of the court.[1]

Mr. Green: No, we could not have done it that way. Then my clients would have had to give up the only vital right they had to bargain. The only other way this matter could have come up is the way it did come up, that is, by a contempt action in this Court, because this is the only way this matter could have been heard. I will say this to this Court that on Friday after the hearing of the Board of the International Longshoremen's Association in Chicago, where they were negotiating this matter, I explained the entire situation to them and they were reluctant to give up their rights as far as their economic rights were concerned and it was apparent that this Court had made a court order that was invalid on its face."

* * * * *

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[1] A final hearing in an action of this kind could not have been heard, in view of the court docket, for months.

6. Pickets Disobey Injunction on Orders of Union Superiors.

After this explanation the court wanted to know whether the men acted on their own initiative or whether someone told them to disobey the order of the court. The following from the record, at page 25, answered that question:

> "Mr. Green: I have said, I have already said to the court that they obviously did not act on their own initiative.
>
> The Court: Who did?
>
> Mr. Green: *Well, they were—*
>
> The Court: Who did?
>
> Mr. Green: *—instructed to do so by their superiors in the union* * * *, after they were advised by counsel that the order was not— (Our emphasis).
>
> The Court: That is a contempt of court."

In concluding the June 1st hearing the court said (R. 25):

> "They can either go back to work or they can come in here on Friday morning at 10:00 o'clock and purge themselves of contempt."

(Whether or not the court had a right to issue the injunction in the first place is one thing, but ordering the men back to work is another, and, we suggest, placed the court in the position of using its authority in an effort to break the strike.)

7. Lawyer Held in Contempt For Advice Given Client.

The men did not return to work as ordered by the court and did appear in court on Friday, June 3rd, as directed. The hearing held on that day was somewhat repetitious of the June 1st hearing. The court never did

get around to make a final order holding the men in contempt so that a writ of habeas corpus could be filed to test the court's jurisdiction.

Instead, the court started to badger and insult the petitioner who tried to explain to the court that inasmuch as the men were involved in a proceeding criminal in nature they were not required to testify against themselves. The pertinent part of the record of that hearing was as follows (R. 27):

"The Court: * * * Well, now, I think we should hear from these gentlemen who are held in contempt. Whether they are represented or whether they are not represented, they may individually or through counsel purge themselves of their contempt. It is very apparent from what has been tendered this morning that they are in contempt of court. The opportunity is always given, of course, to anyone who has violated an order of the court, to purge themselves if they choose to do so; so I think they should be called upon; well, I don't know whether they are represented by anyone or not.

Mr. Green: You mean these gentlemen?

The Court: Yes.

Mr. Green: They are represented.

The Court: By an attorney?

Mr. Green: They haven't taken my license away yet.

The Court: Well, what do you propose to do?

Mr. Green: If the court please, assuming they are resting, I propose to rest also, Your Honor. We are really here in a criminal proceeding and my clients are not required to testify in such a general action, they are not required—

The Court: You also advised them to violate an order of the court, too.

Mr. Green: I did.

The Court: You did. That may go on to the record, that the attorney appearing for these four defendants having violated the temporary injunction issued by this Court, and that he also advised them now not to take the stand to purge themselves of that contempt. Is that correct?

Mr. Green: I said, Your Honor, that I did not conceive that they could be called in a criminal proceedings to testify against themselves. I believe that this is a quasi-criminal proceedings, and that the law is clear in this matter.

The Court: Do they wish to purge themselves from contempt of court for violation of the court order which has already been violated?

Mr. Green: On behalf of all four men, Your Honor, I would just make this statement, that they do not wish to proceed further in this matter.

The Court: All right, now, I will—we will proceed from there. It is very apparent from what you have said here this morning that you are in contempt of court * * *. I will give you until next Tuesday to purge yourself of contempt of court. You stand from what you said here this morning in contempt of court, very definitely. I guess that's all."

* * * * *

On Monday, June 6th, the Judge signed and filed written charges against the petitioner under authority of, according to a designation made in the charges filed, Sections 2705.02[8] and 2705.03[9] of the Revised Code of Ohio (R. 29).

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[8] The part of Sec. 2705.02 upon which this charge was based is: "A person guilty of any of the following acts may be punished as for a contempt: (A) Disobedience of or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or an officer."

[9] Sec. 2705.03 provides in part: "In cases under 2705.02 * * *, a charge shall be filed * * *, and an opportunity given to the accused to be heard, by himself or counsel. * * *"

The charges after reciting that the court had issued an injunction on May 27, 1960, went on to say (R. 29):

> "Whereas, one Merritt W. Green II, legal counsel for the defendants, did with full knowledge of said restraining order, advise and counsel said defendants to disobey said order; and
>
> "Whereas, said defendants and others, acting on the advice and counsel of said Merritt W. Green, II, did disobey said order by continuing picketing at or near the vicinity of the premises of the plaintiff at 26 Main Street, Toledo, Ohio, and
>
> "Whereas, said Green, after being notified in open court by the undersigned, that he was in contempt of court did and does continue to advise the said defendants to continue to disobey said order of the court;
>
> "Said Green is hereby charged with being in contempt of court, and a hearing thereon is set for June 7, at 10:30 o'clock, a.m., and the clerk is instructed to enter this charge on the journal of the Court.
>
> John M. McCabe,
>
> Judge of the Court of Common Pleas, Lucas County, Ohio."

That concluded the second phase of this matter.

3. Court Refuses Trial or Testimony in Defense.

The third and final phase of this case began on June 7, 1960 when the petitioner appeared before the court which declared him to be guilty of contempt during the earlier contempt proceedings of the union officials.

Following a discussion between the court and counsel for the petitioner at the start of the June 7th proceeding, during which time the court's jurisdiction of the subject matter was again raised, counsel for the petitioner endeavored to elicit from the court the real purpose of the proceedings that day.

After the court made it clear that he had determined the guilt of the petitioner on a prior date (R. 33, 34, 35.); that the petitioner was not going to have a hearing or a trial (R. 34.); that the petitioner would not be permitted to testify under oath in his own behalf (R. 34, 35.); that the only purpose of the proceedings was to sentence the petitioner (R. 33, 45.); counsel for the petitioner, after considerable difficulty in establishing the right to do so, read into the record, as an offer to prove, what the petitioner's testimony would have been had the court permitted him to take the stand. (R. 35, etc.)

The court thereupon ordered the petitioner committed to the Lucas County Jail for a period of ten days and to pay a fine of Five Hundred Dollars and stand committed until the fine is paid. (R. 46.) The court refused to grant bail in order for the petitioner to perfect an appeal. Therefore, a writ of habeas corpus was immediately filed in the Court of Appeals of Lucas County, Ohio. (R. 1.) The oral hearing on the application for a writ of habeas corpus was held on June 9, 1960.

9. No Disputed Facts at Appeals Court Hearing.

The hearing was short but the record discloses the following agreed and undisputed facts:

The employer was engaged in interstate commerce. (R. 2.)

The restraining order issued by the Court of Common Pleas was against peaceful picketing. (R. 2.)

That there was then pending an unfair labor charge before the National Labor Relations Board. The parties had agreed to dismiss this charge as a part of the strike settlement. (R. 3.)

The injunction action out of which the contempt citation against the petitioner arose was dismissed on June 9. (R. 6.)

Counsel for the employer, referring to the unfair labor practice charges said: "It alleged in a vague sort of a way that the company, the employer, Toledo Marine Terminals, had refused to bargain collectively, although *at the time it was filed, negotiations were almost continuously under way.*" It was filed, as the record discloses, on the morning of May 27, 1960, before the employer had filed a petition asking for an injunction. (R. 3.)

The Court of Appeals was informed that there was no allegation or claim any place along the line that there was any violence, intimidation, public disorder, blocking of entrances, or anything like that. "This is strictly a peaceful picketing case. No claim that there was anything but peaceful picketing." (R. 5.)

The petitioner was sworn, following which, it was stipulated that his testimony would consist of the same his counsel read into the record in the Court of Common Pleas "after the court refused to permit him to be sworn or give testimony." (R. 7.)

Following the filing of briefs, the Court of Appeals refused to order the release of the petitioner, one Judge dissenting. (R. 48.) On appeal as of right to the Supreme Court of Ohio, the decision of the Court of Appeals was affirmed, two Judges dissenting. (R. 63.)

10. Content of Supreme Court Decision.

In affirming the Court of Appeals, the Supreme Court said:

> (1) "An individual against whom an order of a court is directed may violate such order and properly urge in his defense in a contempt proceeding that the order is void."

But, the Court held, a lawyer is in contempt of court if he advises a client of his right to disobey a void order of a court. The fact that the order is void, the court said, makes it none the less contempt. (R. 67.)

(2) That even though the Court of Common Pleas did not have jurisdiction over the subject matter, once having issued the order it became a valid order and remained one until the court held otherwise. (R. 67, 68.)

(3) The Court of Common Pleas had the right to issue an ex parte order prohibiting *all* picketing at the premises of the interstate employer solely on the basis of a petition by the employer *even though it did not allege any acts of violence or conduct likely to produce violence, mass picketing, threats, intimidation, or any kind of disorder* arising from the picketing of the employer's premises, *but alleged only a conclusion* that to permit picketing to continue "will result in danger to life and limb of the employees of the plaintiff company and irreparable loss and damage to property of the plaintiff. (R. 68.)

(4) That no trial or hearing was necessary because "the contempt had already occurred as disclosed in the hearing on June 1st and June 3rd, and the Judge presiding over that hearing was the same Judge who issued the restraining order and who conducted the proceedings on June 7th." (R. 69.)

These facts, the court apparently concluded, justified denying the petitioner the opportunity to offer *any defense* to the written charges of indirect contempt.

SUMMARY OF ARGUMENT.

1. Lack of State Court Jurisdiction.

The procedure suggested by the petitioner to test the jurisdiction of the state court was the product of necessity born of unusual circumstances.

The court, despite assurances given to the petitioner, issued an ex parte temporary injunction ordering all peaceful picketing to cease in a labor dispute affecting interstate commerce. Thereafter the court refused to hold a hearing before the final hearing on the permanent injunction. Convinced that the court did not intend to determine the issue of jurisdiction and convinced that the ex parte order was void and if obeyed would have the immediate effect of destroying the concerted bargaining rights of the employees, the petitioner then suggested to the union's regional counsel the possibility of obtaining a hearing via habeas corpus if picketing continued.

For doing this the petitioner was sentenced to jail and assessed a $500.00 fine.

The Ohio courts by their decisions here sanction the circumvention of the Supremacy Clause of the United States Constitution by holding, in effect, that every ex parte temporary injunction is a status quo order to preserve existing conditions, relying on the decisions of this Court in *United States v. Shipp*, 203 U. S. 563 (1906), and *United States v. United Mine Workers*, 330 U. S. 258 (1947), to reach that conclusion.

An examination of these two cases does not, we submit, support the conclusions reached by the Ohio courts.

In those cases interlocutory orders were issued *in order to preserve conditions then existing.* There was no question that the court in each case did have jurisdiction over the subject matter. Neither case holds or infers that an interlocutory order issued by the court *not having jurisdiction over the subject matter* is valid for any purpose.

Our case did not involve a temporary order to preserve existing conditions by a court having jurisdiction over the subject of the action. The injunction sought and granted was the main relief sought and was not ancillary to the main relief as in *Shipp* and *United Mine Workers.*

In this case no status quo order was issued because: (1) the court did not intend its injunction to preserve existing conditions until it had an opportunity to determine its jurisdiction; (2) under Ohio law (Sec. 2727.03 R. C.) the court was required to determine its jurisdiction in order to issue a temporary injunction at the beginning of the action; and (3) the conditions existing at the time when the injunction was issued were a strike and picketing, conditions prohibited not preserved by the ex parte order.

The method used by the Ohio courts to circumvent the Supremacy Clause of the Constitution surely interferes with the preservation of a uniform labor policy unaffected by local rules or prejudices as Congress intended when it created the National Labor Relations Board, reposing exclusive and primary jurisdiction in that board for the purpose of resolving and adjudicating all matters protected and prohibited under Sections 7 and 8 of the Act.

The sanction given by the Ohio courts to the prohibition of all picketing arising out of a labor dispute between an interstate employer and his employees is in di-

rect conflict with *Youngdahl v. Rainfair, Inc.*, (1957) 355 U. S. 131, where this Court held that though state courts can enjoin violence, intimidation and threats of violence by strikers, they cannot encroach upon the exclusive jurisdiction of the N. L. R. B. by prohibiting all picketing.

The only time a state court may enjoin all picketing, this Court held, is when the violent activity is such as to make further peaceful picketing impossible. There is not, we believe, one word in this record to justify a deviation from the law as pronounced by this Court in *Youngdahl, supra.*

The plaintiff in the initial state court action based its prayer for injunction on the claim that the defendants had breached a no strike clause of the alleged contract by again establishing a picket line at the plaintiff's property; *not on acts of violence or disorder by the pickets.*

The petition filed reveals that there was not one single word alleged claiming mass picketing, threats, intimidations, name calling, blocking of entrances, causing traffic delays or stoppage, or any public disorder of any kind or description.

These Ohio decisions also do violence to the clear pronouncements of lack of state court jurisdiction contained in *San Diego Building Trades Council v. J. S. Garmon*, (1959) 359 U. S. 236 and, of course, other pronouncements by this Court in the development of the pre-emption doctrine starting with *Joseph Garner v. Teamsters, Local 776*, (1953) 346 U. S. 485, and on down through *Weber v. Anheuser-Busch, Inc.*, (1955) 348 U. S. 478; *Guss v. Utah Labor Relations Board*, (1957) 353 U. S. 1; *Amalgamated Meat Cutters v. Fairlawn Meats, Inc.*, (1957) 353 U. S. 20; *San Diego Building Trades Council v. J. S. Garmon*, (1957) 353 U. S. 26.

The violence done here to the pre-emption doctrine

by the Ohio courts is evident by only casual reference to the second *Garmon* case, 359 U. S. 236.

The opinions in that case make it clear that *the Labor-Management Relations Act has effected a withdrawal of the jurisdiction of the courts of the respective states over any controversy, dispute or conduct which may be said to be arguably protected or prohibited by the Act.*

Two other aspects of the pre-emption doctrine which are particularly applicable to the original injunction action here to prohibit picketing are clearly within the principles stated in the second *Garmon* case, *supra*; principles completely ignored by the Ohio courts. They are:

First, it is the nature of the dispute or controversy as well as the conduct sought to be enjoined, and not the mode of regulation or the cause of action upon which a suit is based that determines which tribunal has jurisdiction to determine the issues involved.

Second, the state courts, in an action to enjoin peaceful picketing, are not to determine whether the court has jurisdiction but rather to determine whether or not the dispute and activity sought to be enjoined are *arguably or potentially* within the jurisdiction of the National Labor Relations Board, deferring to that tribunal full authority to determine whether the dispute or controversy or conduct of the respective parties is a protected, unprotected or prohibited activity under the Labor-Management Relations Act. Any doubt must be resolved in favor of the National Labor Relations Board jurisdiction.

The procedure suggested to the union officials by the petitioner was certainly consistent with this Court's holding in *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Wisconsin Employment Relations Board*, 340 U. S. 383 (1951) as well as

decisions on the same issue by the highest courts of Texas, Michigan, and Indiana.

The Supreme Court of the State of Texas in the cases of *Ex Parte Dilley*, (1960) 334 S. W. (2d) 425, and *Ex Parte Twedell*, 158 Texas 214 (1958), 309 S. W. (2d) 834; the Supreme Court of Michigan in the case of *Town and Country Motors v. Local 328 I. B. T.*, 355 Mich. 26 (1959), 94 N. W. (2d) 442 and the Supreme Court of Indiana in *State Ex Rel. Taylor* (1959) 162 N. E. (2d) 90 have approved the procedure followed by the petitioner. These cases are on all fours with this case.

In each of those cases the court held that the Labor-Management Relations Act had pre-empted the jurisdiction over the subject matter of the action thereby rendering the temporary injunction or restraining order void and in each instance contempt convictions issued by the trial courts for disobedience of the void orders were declared unenforceable. Parenthetically, in none of the cases was there a hint or suggestion that the attorney representing the defendants seeking this means of testing the jurisdiction of the court should be held in contempt for the advice given their clients.

In the Wisconsin case the Employment Relations Board obtained an ex parte restraining order requiring that the petitioners "absolutely desist and refrain from calling a strike, or going out on strike * * * which would cause an interruption of the service of the (Gas Company)" and ordering the petitioners to "take immediate steps to notify all employees called out on strike to resume service forthwith." The Wisconsin Court found that the petitioners had not obeyed the restraining order and entered a judgment of contempt.

This Court reversed the contempt conviction, holding that the subject matter of the particular dispute had been

pre-empted by the enactment of the Labor-Management Relations Act of 1947 and, therefore, the contempt order of the state court was unenforceable.

There is no difference in substance between the procedure adopted by the petitioner in the present case to test the jurisdiction of the Ohio trial court over the subject matter of the dispute and that adopted by the attorneys representing the unions in the above cited case.

2. Threat of Contempt Deprives Employees of Counsel.

This Court condemned the use of contempt to silence a lawyer in the honest discharge of his duty to a client in the case of *In re Watts*, 190 U. S. 1 (1902). One statement by Chief Justice Fuller at page 29 and in that case brings into focus the sharp conflict between the Ohio courts and this Court on the right of members of the legal profession in good faith to advise their clients:

> "* * * the essence of the alleged contempt was that, assuming that action was taken pursuant to the advice of these attorneys, they were liable to condemnation for giving such advice. In the ordinary case of advice to clients, if an attorney acts in good faith and in the honest belief that this advice is well founded and in the just interests of his client, he cannot be held liable for error in judgment. The preservation of the independence of the bar is too vital to the due administration of justice to allow of the application of any other general rule."

The advice given by the petitioner here was given after a thorough examination and research of the law. The several cases discussed more fully in this brief provide ample authority for the procedure adopted and the advice given. The advice was given in good faith and without any attempt to malign or bring the court into disrepute. It was a candid effort on the part of the petitioner to test the

jurisdiction of the trial court over the subject matter of a labor dispute affecting interstate commerce after the court left no other course open for the determination of the issue. All parties involved were aware that the procedure adopted by the petitioner was a technical means of obtaining a final and appealable order.

The independence of the bar in the administration of justice is as important before state courts as it is before federal courts, particularly when the state courts are interfering with the administration of federal law. To permit the jailing of lawyers by state courts for giving advice in good faith is to deprive employees of interstate employers of counsel.

3. Due Process Requires Full Trial; Impartial Court.

In asking this Court to strike down the Ohio decisions for the reason that the petitioner was denied due process of law in not receiving the rudiments of a fair hearing before a fair tribunal we do not urge any expansion of the outer limits of the concept of civil rights. The peculiar facts of this case add up to disclose a shocking and total failure to respect the basic rights of this lawyer as a citizen and the rights of the labor organization under the constitution and federal law.

The Ohio trial court, for instance, seized upon isolated statements at the contempt hearings of the union officers, statements torn completely out of context, and during the last of such hearings declared the petitioner guilty of contempt of court for advising his clients.

When the petitioner appeared before the same Judge on June 7th, 1960, no evidence was introduced respecting the crime with which the petitioner was charged. Only brief statements were made by the court to the effect that the petitioner had advised the defendants to disobey the

order of the court and was, therefore, in contempt. Despite the fact that the proceedings constituted criminal contempt the petitioner's counsel was not permitted or afforded the opportunity to inquire into the statements made by the court nor was the petitioner permitted to take the stand in his own behalf or produce other witnesses or evidence. The court instead clearly stated that the only purpose of convening court on the 7th day of June, 1960 was for the purpose of sentencing the petitioner.

The conflict between the conduct of the Ohio trial court and the minimum requirements of due process established by this Court are evident by only a casual reference to three decided cases.

In the case of *In re Oliver*, 333 U. S. 257 (1947), this Court laid down the law that a defendant in indirect contempt proceedings is guaranteed (1) the right to reasonable notice, (2) a right to a trial, (3) a reasonable opportunity to defend himself, (4) the right to testify and be heard in his defense, and (5) the right to examine witnesses.

In an earlier case, *Cooke vs. U. S.*, 267 U. S. 517 (1925), this Court held that even though knowledge of the alleged contempt be acquired from the testimony of others, *or even from the confession of the accused*, those facts would not justify conviction without a trial in which there was an opportunity for defense.

In a subsequent case before this Court, *In re Murchison, et al.*, 349 U. S. 133 (1955) a case arising out of the use of the one-man grand jury system in Michigan, the question before the court was whether a contempt proceeding conducted in accordance with the minimum standards established in *Re Oliver, supra*, "complies with the due process requirement of an impartial tribunal" where

the same Judge presiding at the contempt hearing had also served as the "one-man grand jury" out of which the contempt charges arose. The Court said:

> "A fair trial in a fair tribunal is a basic requirement for due process." and
>
> "Fair trials are too important a part of our free society to let prosecuting Judges be trial Judges of the charges they prefer."

The honest statements of the petitioner at the June 1st and June 3rd hearings were not contemptuous per se and involve no more than a recitation of the facts which had occurred outside the courtroom. The statements attributable to the petitioner by the Ohio courts as justification for the denial of a trial are wholly inaccurate when viewed in the context of the entire record. The refusal to accord the petitioner an opportunity to explain those statements and to call witnesses to verify his explanation is, we suggest, in direct conflict with everything established in *Cooke, Oliver* and *Murchison* as basic elements of due process of law to be accorded to every citizen.

ARGUMENT.

The law we believe to be pertinent in this case will be discussed within the framework of three sections. This will be done in the order in which the questions occurred from the beginning of the original proceedings on down through the contempt case involving the petitioner.

The law to be discussed in these three sections relates to:

1. Jurisdiction of State Court.

   Whether the state court had jurisdiction of the subject matter in the action filed by the employer and the right to issue an injunction prohibiting peaceful picketing in the labor dispute admittedly within the area of interstate commerce.

2. Contempt of Court.

   Whether the proper administration of justice in the areas of both federal and state law and procedure requires that lawyers be permitted to give and clients receive advice based on an honest interpretation of the law and given in good faith for the protection of the rights of clients.

3. Due Process of Law.

   Whether the constitutional guarantees of due process can be denied a lawyer charged with contempt for giving advice to his client.

I. THE STATE COURT DID NOT HAVE JURISDICTION OF THE SUBJECT MATTER.

(a) Jurisdiction of the Subject Matter is Essential to the Issuance of Valid Order.

At the outset we suggest that if the Court of Common Pleas of Lucas County, Ohio did not have jurisdiction over the subject matter of the original injunction action filed by

the employer against the union it must necessarily follow that the court did not have authority to issue either the temporary or the permanent injunction requested by the employer, or hold the petitioner to be in contempt of court.

We can find no serious disagreement among the authorities that an order issued by a court beyond or in excess of its jurisdiction is a nullity. This principle appears to be as old as the common law.

In discussion of "The Doctrine of Judicial Immunity" in the June 1960 issue of the American Bar Association Journal, at page 605, reference was made to a case decided at the Michaelmas Term in the tenth year of the reign of King James, published in Volume X of Lord Coke's reports in the year of 1613. The author quoted the rule in this language from that case:

> "* * * When the court does not have jurisdiction of the cause, the whole proceeding is coram non judice, and action will lie without any regard to the precept or process, for *'it is not of necessity to obey him who is not judge of the cause, no more than it is a mere stranger.'* " (Emphasis ours.)

American Jurisprudence summarizes the rule in Volume 14 where at page 363, Section 160, it say :

> "Jurisdiction is concisely stated to be the right to adjudicate concerning the subject matter in a given case."

and at page 385 where it is said:

> "The first duty of a court is to determine whether it has jurisdiction of the subject matter. * * * *Where judicial tribunals have no jurisdiction of the subject matter* on which they assume to act, *their proceedings are absolutely void* in the strictest sense of the term." (Emphasis ours.)

Then in the same section of *American Jurisprudence* (191) this statement is made relative to the duty of the court to recognize and to determine want of jurisdiction:

> "A court will recognize want of jurisdiction over the subject matter even if no objection is made. Therefore, *whenever a want of jurisdiction is suggested*, by the court's examination of the case or otherwise, *it is the duty of the court to consider it*, for if the court is without jurisdiction, it is powerless to act in the case." [10] (Emphasis ours.)

The rule of jurisdiction is the same in contempt matters. To constitute contempt the order or injunction disobeyed must be a lawful one and issued by a court acting within its jurisdiction. This rule is stated in Section 24 of 12 *American Jurisprudence* at page 405 where, among other pertinent statements, it says:

> "* * * to render one liable for contempt in disobeying an order of decree of court, it is essential that the court have jurisdiction in the premises. Disobedience of an order made without jurisdiction, or in excess of jurisdiction is not punishable as contempt."

This Court in *Ex Parte Fiok*, 113 U. S. 713 (1884) had this to say on that subject:

> "If a court is without authority to make an order it is equally without authority to enforce such orders by process for contempt."

and in the case of *In Re: Ayres, Scott & McCabe*, 123 U. S. 443 (1887) this:

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[10] Here want of jurisdiction was suggested to the court (1) by the phone call prior to the issuance of the injunction; (2) by the petition for injunction; (3) at each meeting with the court thereafter starting with the one minutes after the ex parte order was issued; and (4) by the court (R. 20) where the court said: "The court may not have jurisdiction; I don't know; perhaps some of these preliminary matters should have been cared for."

"When a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which the court had no authority to make, the original order being void for want of jurisdiction, the order punishing for contempt is equally void; * * *."

A distillation of cases pertaining to jurisdiction leads to the conclusion that there are three essentials necessary to the validity of every judgment: (1) jurisdiction of the parties, (2) jurisdiction of the subject matter, and (3) power or authority to decide the particular matters presented. Each of these three elements must be present to make a decree or judgment of a court of competent jurisdiction valid and binding so that such judgment or decree cannot be subject to collateral attack. 12 *A. L. R.* (2d) 1066.

(b) The Labor Dispute in Progress Involved Interstate Commerce—the Picketing was Entirely Peaceful.

In considering whether the Court of Common Pleas of Lucas County, Ohio had jurisdiction of the subject matter of the action out of which contempt charges against the petitioner arose, these undisputed facts are pertinent:

1. The employer was engaged in interstate commerce. (R. 2.)

2. There was an unfair labor practice charge then pending against the employer before the N. L. R. B. (R. 3, 19.)

3. Counsel for the Terminal Company conceded that negotiations as well as picketing were in progress when he filed the injunction petition. (R. 3, 18.)

4. Picketing was peaceful. There was no disorder of any kind; there was no mass picketing; there was no blocking of entrances to the premises of the

employer; there was no blocking or obstructions of the public streets or sidewalks. (R. 2, 5.)

5. The so-called labor contract, Exhibit A of the injunction petition, shows on its face that it was not completely executed. (R. 15.)

6. The action filed by the plaintiff in the Court of Common Pleas sought only to enjoin picketing. The prayer requested (1) a temporary injunction (R. 11), and (2) a permanent injunction. (R. 12.)

7. The relief sought, both temporary and permanent, was to prohibit peaceful picketing which was in progress at the time the petition was filed. (R. 2, 5.) The petition did not contain any allegations of fact—not one—that the picketing was anything but peaceful in every respect. (R. 8, 9, 10, 11, 12.)

8. The injunction sought and the injunction granted *was not* to preserve existing conditions. The employees were already out on strike. (R. 18.)

Despite these undisputed facts, *the Ohio Courts held that the temporary injunction against peaceful picketing was valid simply because the Court of Common Pleas had taken jurisdiction over the labor dispute and had issued an injunction.*

(c) Assuming Jurisdiction Does Not Create Jurisdiction to Make a Temporary Injunction a Valid "Status Quo" Order.

Without one word in reference to the decisions of this Court which have refined the pre-emption doctrine in interstate labor matters or the provisions of the Labor-Management Relations Act, the Ohio Courts held that the Court of Common Pleas had jurisdiction to issue the temporary order prohibiting all picketing of the premises of

the Toledo Marine Terminal to preserve existing conditions until such time as the court could pass upon the question of its own jurisdiction. (R. 50, 52, R. 67, 68.)

This was on the theory that having issued a temporary injunction, even if done without jurisdiction over the subject matter, the order somehow created jurisdiction until such time as the court could get around to determine that it did not have jurisdiction over the subject matter.

The Ohio courts in approving the action of the trial court prohibiting peaceful picketing, relied principally on the decisions of this Court in *United States v. Shipp*, 203 U. S. 563, 51 L. Ed. 319, and the *United States v. United Mineworkers of America*, 330 U. S. 258, 91 L. Ed. 884, where it was held that an order issued to preserve existing conditions by a court *with jurisdiction over the subject matter of the action* must be obeyed until the court had an opportunity to consider the questions raised by the pleadings and/or evidence.

The effect of the Ohio decisions in equating the facts here with situations in genuine status quo cases is to make every temporary injunction in a strike situation a valid status quo order. We submit that there could not be a more effective device created to deprive employees of rights granted and protected by federal law than court-sanctioned use of the ex parte injunction, as here, under the guise of being a valid status quo order such as in *Mineworkers* and *Shipp, supra*.

Here the Ohio courts have devised a very simple method by which state courts can successfully evade the Supremacy clause of the Federal Constitution, the provisions of the Labor-Management Relations Act and the decisions of this Court. To make this device more effective the Ohio courts make it a criminal offense if those entitled to the privileges and protection of Federal law,

including the right to counsel, are honestly and correctly advised that the ex parte injunction is not valid. (R. 67.)

(d) The Temporary Injunction Prohibiting Peaceful Picketing Was Not a Status Quo Order.

Do the facts of this case raise the temporary injunction issued by the Ohio trial court to the status of a valid status quo order? We think not.

First, the Ohio court did not intend its order to be for the purpose of preserving conditions then existing. It's only purpose was to stop picketing. In fact, the court, without any authority in law of which we are aware, went so far as to order the strikers to return to work under threat of contempt.[11]

Second, under Ohio law, the court's temporary injunction could not be a status quo order for the purpose of preserving conditions until it could determine its jurisdiction. This is so because injunctions can be granted at the beginning of an action *only* when it appears that the plaintiff is entitled to an injunction.[12] Inasmuch as this *was not* a restraining order pending hearing on an application for a temporary injunction[13] but was a temporary injunction, *the court was required to determine that it did have jurisdiction over the subject matter before it issued the temporary injunction.*

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[11] "* * * They can either go back to work or they can come in here on Friday morning at 10:00 o'clock and purge themselves of contempt." (R. 25.)

[12] Section 2727.03 Ohio Revised Code, so far as it applies to the case, provides: "At the beginning of an action, * * * an injunction may be granted * * *, when it appears * * *, that the plaintiff is entitled to an injunction."

[13] Section 2727.06 Ohio Revised Code provides that a restraining order can be issued pending a hearing on the issuance of an injunction. This is the only provision in Ohio law for the issuance of a restraining order.

None of the cases relied upon by the Ohio courts, *United States etc. v. John Shipp, et al.*, 203 U. S. 563 (1906) and *United States v. United Mineworkers etc.*, 330 U. S. 258 (1947) in particular, hold or infer that an interlocutory order issued by a court *not having jurisdiction over the subject matter* is valid for any purpose.

In those cases, the so-called status quo cases, interlocutory orders were issued in order to preserve conditions existing at the time the orders were issued. There was no question that the court in each case *did have jurisdiction over the subject matter.*

This case, however, did not involve a temporary injunction to preserve existing conditions by a court having jurisdiction over the subject matter. *The injunction granted here was the main relief sought. It was not ancillary to the main relief* as in *Shipp* and *Mineworkers.*

In *Shipp* this Court had granted a petition to appeal the judgment of the Circuit Court of Appeals in a case involving a death sentence decreed by a Tennessee state court. Pending hearing on the appeal, an order was issued to state officials to stay the execution. This order was violated. There could be no question that the court had jurisdiction over the subject matter, to-wit: an appeal on constitutional grounds and thus a right to issue a stay order—to preserve the life of the prisoner. Certainly this Court and only this Court, once having noted probable jurisdiction, could determine whether jurisdiction was to be exercised in the final instance.

In *Mineworkers* the government had filed an action for declaratory judgment to determine whether the union had a right to unilaterally terminate a labor contract, the Federal Government then being the operator of the coal mines. A request for a temporary injunction was made pending the hearing on the merits. A date was set for a

hearing on the request for the temporary injunction, pending which a restraining order was issued prohibiting a strike by the mine workers. The mine workers went on strike despite the order.

Again, there is no question that the District Court had jurisdiction over the subject matter of the action—the declaratory judgment—and had a right, pending a hearing on the temporary injunction, to issue an order to preserve existing conditions.

In our case, however, the trial court arrogated jurisdiction to itself in issuing the temporary injunction in circumstances where it had none in the first instance. It cannot be said, we feel, that a court without jurisdiction can make jurisdiction by merely taking jurisdiction. For instance, in *Green, et al. v. Obergfell, et al.*, 121 Fed. (2d) 46 the court said that an exercise by a court of its power to determine whether the conditions essential to the exercise of jurisdiction by it exists cannot create additional jurisdiction.

(e) Ex Parte Injunction Prohibiting All Picketing Not Warranted in Absence of Violence or Other Disorder.

As if approval of the use of the ex parte injunction under the guise of it being a valid status quo order didn't do enough violence to the Supremacy clause of the Federal Constitution in this instance, the Ohio Supreme Court approved the use of the ex parte injunction to prohibit peaceful picketing without the necessity of the petitioning party alleging any facts or circumstances indicating that violence, mass picketing or public disorder of any kind is being carried on or likely to result.

In its opinion the Supreme Court said (R. 68):

> "It is to be noted that the petition filed in the Court of Common Pleas on which the restraining

order was based alleged the imminence of violence in connection with the picketing of plaintiff's premises."

Then the Court went on to say:

"Even in labor disputes where the federal labor relations statutes are applicable and exclusive, the Supreme Court of the United States has held that *state courts possess the authority to intervene to enjoin mass picketing or picketing accompanied by violence and intimidation.*" (Emphasis ours.)

While the Supreme Court's statement of the right of the authority of state courts to enjoin mass picketing, violence, intimidation or other public disorder is not incorrect, *the court's statement* that the petition for injunction "alleged the imminence of violence in connection with the picketing of plaintiff's premises" *has no basis in fact.*

First, the plaintiff did not seek an injunction on the basis of mass picketing or picketing accompanied by violence and intimidation. It sought to enjoin the picketing on the basis of a claimed violation of a collective bargaining contract. Second, *the petition upon which the ex parte injunction was issued did not contain an allegation of one fact relating to mass picketing or picketing accompanied by violence and intimidation.*

In the first nine paragraphs of its petition the plaintiff set forth facts *and conclusions of law* asserting that a collective bargaining contract had been concluded on May 26, 1960, following a strike and negotiations which began May 15, 1960. (R. 8, 9, 10.) The employer-plaintiff claimed that the resumption and/or continuation of picketing May 27th violated a no-strike clause. (R. 10.)

Then in paragraph number 10 (R. 11), after averring that the conduct in "posting of pickets" was illegal and unlawful, the petition said "that a continuation of said illegal and unlawful conduct * * *, which will continue unless enjoined by order of this Court, will result in danger to

life and limb of the employees of plaintiff company and irreparable loss and damage to property of plaintiff company, and that plaintiff has no adequate remedy at law."

This conclusion in the pleading must be that portion of the petition referred to by the Ohio Supreme Court when it said "the petition filed in the Court of Common Pleas * * * alleged the imminence of violence in connection with the picketing of plaintiff's premises." (R. 68.) That this is true is evident from the fact that the language quoted in the preceding paragraph from page 11 of the record is the only language in the petition out of which the Supreme Court's conclusion could have been created.

(f) State Court Assumption of Jurisdiction Violates Supremacy Clause.

The sanction thus given by the Supreme Court of Ohio to the use of the ex parte injunction in interstate labor disputes issued solely on the basis of an employer's petition and without the necessity of alleging any facts justifying the assumption of jurisdiction by state courts not only violates the Supremacy Clause of the Federal Constitution but it can effectively wipe out the doctrine of federal pre-emption in Ohio.

One of the earlier decisions of this Court unequivocally declaring the supremacy of Federal law in labor-management disputes involving interstate commerce was *Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America v. Wisconsin Employment Relations Board*, 340 U. S. 383 (1951).

In that case union officials had been held to be in contempt for either failing to prevent a strike or permitting continuance of a strike by employees of a utility. The Wisconsin Court had issued the injunction pursuant to a Public Utilities Anti-Strike Law.

Among other things, the Court held that none of the sections of the National Labor-Management Relations Act, as amended in 1947, could be read as permitting state regulation of peaceful strikes for higher wages. Congress, the court said, occupied this field and closed it to state regulation, citing *Plankington Packing Co. v. Wisconsin Board*, 338 U. S. 953 (1950); *LaCrosse Telephone Corp. v. Wisconsin Board*, 336 U. S. 18 (1949); *Bethlehem Steel Co. v. New York Board*, 330 U. S. 767 (1947); *Hill v. Florida*, 325 U. S. 538 (1945).

The court found that the Wisconsin law prohibiting strikes and substituting therefore compulsory arbitration was in conflict with Section 7 of the Labor-Management Relations Act permitting the exercise of the right to bargain collectively and engage in concerted activities for that purpose. The court concluded its decision by holding that:

> "the National Labor Relations Act of 1935 and the Labor-Management Relations Act of 1947, passed by Congress pursuant to its powers under the Commerce Clause, are the supreme law of the land under Article 6 of the Constitution."

The contempt convictions were reversed.

(g) State Court Has No Jurisdiction Where Labor Dispute is Arguably or Potentially Subject to National Labor Relations Board Jurisdiction.

The doctrine of federal pre-emption in labor disputes involving interstate commerce has developed through and been refined by the opinions of this Court. This is not to say that every specific issue involving these jurisdictional questions has been resolved by this Court, indeed, it is a field of ever expanding development. It is to say, however, that every succeeding opinion of the Court becomes the

current literature of the doctrine, to which courts and attorneys must turn for the resolution of all issues within this field.

Insofar as it affects the matter which was before the Ohio courts, it may be stated with accuracy, we believe, that a state court has absolutely no jurisdiction to regulate, by injunction or otherwise, peaceful picketing arising out of a labor dispute that is arguably or potentially subject to the jurisdiction of the National Labor Relations Board.

It is, of course, completely within the jurisdiction of the state court to enjoin violent conduct or mass picketing on the part of a union and to award damages to persons injured as a result of such violence. *Union Carpenters Local v. Laburnum*, 347 U. S. 656 (1954); *Youngdahl v. Rainfair, Inc.*, 355 U. S. 131 (1957); *United Oil Workers v. Rochelle*, 356 U. S. 656 (1958). Our case, as we have repeatedly pointed out, involved only peaceful picketing.

The decisions of the Ohio courts in approving the prohibition of all picketing are in direct conflict with this Court's decision in *Youngdahl v. Rainfair, Inc., supra*, where it was held that although state courts can enjoin violence, intimidation and threats of violence by strikers, they cannot encroach upon the exclusive jurisdiction of the N. L. R. B. by prohibiting all picketing. The only time a state court may enjoin all picketing, this Court said, is when the violent activity is such as to make further peaceful picketing impossible.

The first complete statements of the pre-emption doctrine were announced in *Joseph Garner v. Teamsters, Local No. 776*, 346 U. S. 485 (1953) and in *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 478 (1955). The doctrine then received further consideration, refinement and expansion in 1957 when this Court announced its decisions in *Guss v. Utah Labor Relations Board*, 353 U. S. 1, *Amal-*

gamated Meat Cutters v. Fairlawn Meats, Inc. 353 U. S. 20, and *San Diego Building Trades Council v. J. S. Garmon*, 353 U. S. 26. It reached its present all-embracing position in the second Garmon decision in *San Diego Building Trades Council v. J. S. Garmon*, 359 U. S. 236 (1959).

(h) This Court's Second Garmon Decision Covers the Basic Issue of This Case.

The *second Garmon* decision is, we have believed, decisive of our case if, indeed, we were required to go that far for authorities to support the proposition that the initial state court here was without jurisdiction of the subject matter and consequently its orders and contempt decision were, if for no other reason, void.

As we read this Court's decision in the *second Garmon case*, the principal issue was whether the state court had jurisdiction to even award damages arising out of peaceful union activities.

In holding that a state court lacks jurisdiction to award damages to an employer for peaceful union conduct that is potentially subject to exclusive federal jurisdiction under the Labor-Management Relations Act, the Court made several pronouncements which materially affect and firmly establish the pre-emption doctrine and certainly appear to control the matter which was before the state courts in this case.

In outlining what seems to be the basic precepts of the pre-emption doctrine, the Court, in the *second Garmon case*, pointed out that Congress in adopting the Labor-Management Relations Act did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law general to the parties, but has entrusted the administration of the labor policy of the nation to a

centralized administrative agency, the National Labor Relations Board, armed with its own procedure and equipped with its specialized knowledge and accumulated experience. The legislative grant of administrative power to the National Labor Relations Board is more than a means of regulation, this Court held, it is regulation; regulation in the broadest sense, administrative and remedial.

Congress has, the Court said, reposed exclusive jurisdiction in such a tribunal in order to obtain uniform application of substantive law and to avoid the diversities and conflicts which would inadvertently result from a multiplicity of local procedures and attitudes toward labor controversies. The Court pointed out that to allow the States to control conduct which is the subject of uniform national regulation would create potential frustration of national purposes.

The majority opinion in the *second Garmon case*, observed that judicial concern has been necessarily focused on the *nature* of the activities which the States have sought to regulate rather than on the method of regulation adopted.

At times it has not been clear, the Court said, whether the particular activities attempted to be regulated by the State are within or without the exclusive ambit of the National Labor Relations Board. But courts, either state or federal, or not, this Court held, the primary tribunal to adjudicate such issues; *it is essential to the administration of the act that these determinations be left in the first instance to the National Labor Relations Board itself.*

The Court then went on to say that in the absence of the Board's clear determination that an activity is neither protected or prohibited or of compelling precedent applied to essentially undisputed facts, it is not for the courts to decide whether the activities or dispute is subject to state jurisdiction.

Therefore, this Court concluded, *peaceful union activity which is potentially or arguably protected or prohibited by Section 7 or 8 of the Labor-Management Relations Act is not subject to state regulation by any means, and it is within the exclusive jurisdiction of the National Labor Relations Board to determine in the first instance whether particular conduct is protected or prohibited under such sections.*

There are, in summary, two other aspects of the preemption doctrine which have particular application to this case. Both, we believe, have been clearly stated in the *second Garmon decision* and may be stated as follows:

First, it is the nature of the dispute or controversy as well as the conduct sought to be enjoined, and not the mode of regulation or the cause of action upon which a suit is based that determines which tribunal has the right to determine the issues involved.

Second, the state courts, in an action to enjoin peaceful picketing, are not to determine whether the court has jurisdiction but rather to determine whether or not the dispute and activity sought to be enjoined is arguably or potentially within the jurisdiction of the National Labor Relations Board, deferring to that latter tribunal full authority to determine whether the dispute or controversy or conduct of the respective parties is a protected, unprotected or prohibited activity under the Labor-Management Relations Act. Any doubt must be resolved in favor of the N. L. R. B. jurisdiction.

The nature of the dispute in this case and the activity of the union as a result of the dispute was arguably or potentially protected or prohibited by the Labor-Management Relations Act. Therefore the primary responsibility for the determination of the status of the disputed activity was within the jurisdiction of the National Labor Rela-

tions Board. This is particularly true in view of a total absence of any activity involving public disorder and in view of the fact that an unfair labor practice charge had been asserted against the employer prior to the time the position was filed in the Court of Common Pleas.

It would appear then that a reasonable conclusion to be drawn from the decisions of this Court is that the Court of Common Pleas of Lucas County, Ohio did not have jurisdiction over the subject matter and any order issued by that court was a nullity.

(i) Contempt Cannot be Based on Disobedience of Order Issued by Court Without Jurisdiction of Subject Matter.

The question of the state court's jurisdiction over the subject matter is necessarily part and parcel of the right of the trial court to find the petitioner in this case in contempt of court. In 12 *American Jurisprudence* at Section 26, page 407, the text reiterates and reaffirms the proposition that an injunction to be entitled to obedience must be issued by a court having jurisdiction in the matter. The text goes on to lay down this proposition:

> "The only legitimate inquiry in the contempt proceeding, based upon the violation of injunction, is whether the court granting it had jurisdiction of the parties and of the subject matter. * * *
>
> "Where, however, the court in granting the injunction acted without jurisdiction, a violation of the order which it assumed to make does not constitute contempt; no one is bound to obey such a decree and the court making it has no power to punish a disobedience thereof."

For the purpose of demonstrating the sharp conflict between the result in the Ohio decisions and decisions of other state Supreme Courts, we allude to four such de-

cisions which involve the question of contempt for picketing in violation of state court orders prohibiting such activity. Three of these cases, the Texas cases and the Michigan case, are on all fours with our case.

The first of these cases is *Ex parte Twedell*, decided by the Texas Supreme Court on January 29, 1958, 309 S. W. (2d) 834. It was an original habeas corpus proceedings from a commitment order on a judgment of contempt for the violation of a temporary injunction.

The original injunction suit was to enjoin picketing by The Amalgamated Meat Cutters at the various stores of the plaintiff. The picketing was peaceful and the plaintiffs in the original action claimed that there was no labor dispute existing between the stores and their employees and that the union represented none of their employees. A temporary injunction was granted. No appeal was taken from that action by the court. Instead the union resumed picketing. This resulted in the contempt proceedings.

In vacating the contempt conviction the Texas Supreme Court said, starting at page 845:

> "Since we have held that the conduct is an activity within the Labor Management Relations Act, that the business of the Minyard Stores is one affecting interstate commerce, it follows that the state court was without jurisdiction to grant the petition for injunction. This being true, the judgment granting the injunction is void and the Relator cannot be held in contempt of a void judgment."

The Michigan case is *Town and Country Motors v. Local 328, IBT*, 94 N. W. (2d) 442. It was decided by the Michigan Supreme Court on January 12, 1959. The original injunction action arose out of efforts of the union to organize the employees of the plaintiff. In the course of this organization drive and as a part of it, picketing took

place. There were no overt acts of violence and the picketing was peaceful.

A temporary restraining order was issued and contempt proceedings were initiated for the violation thereof. The defendants claimed that the business of the plaintiff affected interstate commerce and that the Circuit Court had no jurisdiction.

After a thorough and exhaustive discussion of the historical, legal and philosophical aspects of the congressional enactments and the pronouncements of the various courts, the Michigan Supreme Court pointed out at page 456 that it was clear that in providing for uniform administration of national labor policy, Congress had elected to entrust the difficult and delicate problems involved, problems going to the very heart of our economic system and to the welfare of thousands of our citizens, to the National Labor Relations Board.

> "Such, then," the court said, "was the intent of the framers of the act with respect to the ex parte labor injunction, the alleged violation of which in the case before us, it is asserted, must now be investigated by the trial chancellor and presumably, if violated, punished, 'irrespective of what action is taken by the Supreme Court on the question of jurisdiction over the subject matter of this cause.'
>
> "The procedure urged, would, as a practical matter, mean the end of the federal pre-emption of the field and the utter nullification of clear congressional intent that there be national uniformity of treatment of this complex social and economic problem. National policy would be effectively frustrated by a diversity of opinion as to how far federal regulation extended. If, moreover, regardless of the state court's jurisdiction, its orders are to be obeyed under pain of contempt, obedience there will be, even at the cost of the loss of the strike, as the long history of labor in-

junctions so eloquently attests. The restraining order temporary in name is decisive in reality. We cannot interpret the legislation before us as permitting the restoration to full vigor of the ancient evils described.

* * * * *

"The Board, and only the Board, may obtain injunctive relief, should such be the public interest. We are led to conclude that the state courts are without jurisdiction in the most elementary sense. The order of the court being void for want of jurisdiction over the subject matter, we cannot remit to such court the fruitless task of ascertaining whether or not certain acts of the defendants constituted a 'contempt' of the void order." (Emphasis ours.)

The court then went on to pronounce its judgment at page 457 in the following terms:

"Where, then, as here, the National Labor Relations Act pre-empts the field and exclusive jurisdiction is vested in the National Labor Relations Board, both authority to enjoin within the pre-empted area and to punish for contempt of the null injunction are denied the state by the federal act." (Emphasis ours.)

In the Indiana case, *State ex rel. Taylor v. Circuit Court of Marion County*, decided November 5, 1959, 162 N. E. (2d) 90, the question before the court was whether a restraining order was void for having been issued without strict compliance with the Indiana anti-injunction law.

The court found that the restraining order was in fact issued without compliance with the anti-injunction law of the State of Indiana and held, at page 93:

"Having disposed of the issue of jurisdiction the collateral issue of contempt is readily resolved. *It is well established that a void order cannot be the basis of a citation for contempt.* * * * Hence respondent court

was without jurisdiction to issue the contempt citations * * *." (Emphasis ours.)

The other Texas case, *Ex parte Dilley et al.* 334 S. W. (2d), 425, decided in April 1960, relies upon the second *Garmon* decision, as well as previous pre-emption doctrine cases, in striking down contempt actions against pickets *who acted on advice of counsel*—the lawyer who gave the advice, so far as the report reveals, was not cited.

Dilley and the others cited were officers of a building trades council. They picketed a construction site after advising the contractor that they would do so if the contractor continued to undercut union wage conditions. The employees involved were not union members. They did not have a dispute with their employers.

A temporary injunction was issued against the picketing, which was peaceful. *"The relators sought and obtained legal advice and acting thereon"* they eventually resumed picketing.

Relying upon Garmon and the other pre-emption cases, both federal and state, the court at page 432 held:

> "The District Court of Dallas County was without jurisdiction to issue the injunction * * *. The relators are completely discharged and found not guilty of contempt * * *."

The cases heretofore cited seem to be in accord with the general rule stated in 12 *A. L. R.* (2d) beginning at page 1064. At page 1067 the general rule is stated this way:

> "Subject only to one or two exceptions to be noted later, by an almost unbroken line of authority and unanimous consensus of judicial opinion the rule may be said to be firmly established that a court does not possess the right or power to punish as for contempt a disregard or violation of its order or decree which it

> has rendered without jurisdiction over the subject matter or the parties or without power or authority to render the particular decree or order. Lack of such jurisdiction or power may therefore be raised by the person charged with the contempt for the violation of the order or decree in a collateral proceeding on appeal from a judgment of conviction for contempt or upon an application for habeas corpus to test the validity of the imprisonment for contempt."

In view of the aforegoing authorities it would seem abundantly clear that *even* if a lawyer could be charged with contempt for honestly and in good faith advising his clients as to the substantive law and procedure, *contempt cannot be based on the disobedience of a void order—one issued by a court without jurisdiction over the subject matter.*

II. TO HOLD A LAWYER IN CONTEMPT FOR GIVING HONEST ADVICE NOT ONLY DEPRIVES THE LAWYER OF HIS RIGHT TO FULLY ENGAGE IN HIS PROFESSION BUT DEPRIVES HIS CLIENTS OF COUNSEL.

If lawyers are forbidden to give honest legal advice to clients under pain of being jailed, the net result, of course, is to deprive the lawyer of his right to fully and effectively engage in his profession and to deprive clients of counsel.

We recognize that the States have a right to regulate the practice of law within their respective jurisdictions and have the right to establish the procedure governing litigation in their courts. The States, however, in exercising these rights cannot include areas beyond the jurisdiction of the state courts or disregard constitutional limitations and/or guarantees.

The Ohio decisions do two things: (1) approves the assumption of jurisdiction by the state court to prohibit peaceful picketing and, (2) approves the punishment of

those who dare to seek a legal means to obtain a court hearing.

(a) To Deprive Employees of Counsel Interferes With Rights Granted Under Section 7 of the Act.

The position of the Ohio courts is substantially the same as the one struck down by this Court in *Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America v. Wisconsin Employment Relations Board*, 340 U. S. 383 (1951). There the contempt arose out of the violation of an order issued under the Wisconsin Public Utility Anti-Strike Law. The court held that in forbidding strikes the Wisconsin law interfered with rights granted to employees under Section 7 of the Labor-Management Relations Act. The "law of the land" was that expressed in the Act, the court held.

Here the assumption of jurisdiction and the issuance of an injunction prohibiting peaceful picketing by the state court accomplished the same result as did the Wisconsin Anti-Strike Act and raised the question whether rights of the employees under Section 7 were being violated.

Thus there are federal questions involved in the jailing of a lawyer for honestly advising a client who is involved in a matter within an area of federal law which guarantees the clients certain rights. This being true, an examination of just what the lawyer did do and consideration of whether what he did do was, in fact, contempt, is apropos.

(b) Lawyer Did Not "Brashly" Advise or Tell Client to Disobey Order.

After twice within a short time being subjected to the experience of having the trial court fail to carry out assurances given him and after consulting his associate

and reviewing the authorities, and being convinced that the court had no intention of granting a hearing to consider the question of its jurisdiction, the petitioner called the union's regional counsel in Chicago and advised him of the status of the matter (R. 41):

> "* * * I explained to him that though it was possible to file a motion to vacate or a demurrer to the petition, that it was apparent from the action of the court that such a motion would not be set down for hearing in the near future and that even if it were, an adverse ruling, which seemed most likely in view of the court's attitude, would not be a final order and could not be appealed. I then told him that if we were correct on the law that an order of the court was wholly invalid, then the only alternative would be to defy the order of the court in the hopes that Mr. Ragan would file contempt proceedings which would undoubtedly be heard immediately and from which we would instantly appeal to the Court of Appeals to determine the jurisdiction of the court."

This conversation with the Union's Regional Counsel and relaying the decision of the union officials to the local union hall was the only role the petitioner had in the decision to continue picketing to test the injunction. (R. 41.)

Parenthetically, we submit that the foregoing report to forwarding counsel does not constitute "brashly advising his client to disobey an existing court order" as the Ohio Supreme Court characterized the report and advice given (R. 67), nor does it substantiate the finding that the lawyer "told them to disobey the order." (R. 69.)

At the contempt hearing of the union officials on June 1st, after the petitioner had carried out his commitments by producing the four men and stipulating the acts which could constitute contempt, when it became apparent to

the petitioner that the arrangement made the previous day in chambers was not to be concluded, he said (R. 23):

> "Your Honor, it was my understanding that they would be cited for contempt and we would be ready to appeal the ruling—would you just mind telling me—if Your Honor will—"

The court then said he wanted the men to tell him whether they just violated the order or whether they were told by someone to do that. Whereupon, the petitioner said:

> "I can advise the court now that they were told by me."

(c) Admissions by Petitioner Relate Only to Report Given Counsel in Chicago; Out of Context Here.

In answer to the court's inquiry as to whether or not he told them that, the petitioner reviewed with the court exactly what had taken place following his efforts to obtain a hearing; that the entire situation had been explained to the officials in Chicago who in turn made the decision that the men should continue picketing in order that a court test could be made of the jurisdictional question. (R. 23, 24, 25.)

At the conclusion of the petitioner's explanation, this exchange took place (R. 25):

> "The Court: After the injunction was issued, I still say I want to know whether they acted on their own initiative in this matter or whether someone told them to disobey the order of the court.
>
> Mr. Green: I have said, I have already said to the court that they obviously did not act on their own initiative.
>
> The Court: Who did?
>
> Mr. Green: *Well, they were—*
>
> The Court: Who did?

Mr. Green: —*instructed to do so by their superiors in the union* in this case according to their own agreement, after they were advised by counsel that the order was not— (Emphasis ours.)

The Court: That is a contempt of court."

It is not clear from the above portion of the record what the court considered to be the acts of contempt or who was guilty of contempt. It would seem to be safe to assume from what happened subsequently that the court was saying that what the petitioner did, i.e., relating the events of the day to counsel in Chicago and suggesting a possible way to get a higher court's determination of the question of jurisdiction in view of the trial court's adamant refusal to grant a hearing, was contempt of court.

The union men returned to court at 10:00 A.M. on June 3rd, as ordered by the Judge at the June 1st hearing when he said:

"They can either go back to work or they can come in here on Friday morning at 10:00 o'clock and purge themselves of contempt." (R. 25.)

Counsel for the employer at this hearing again offered evidence of the picketing, following which the petitioner was asked what he proposed to do. He told the court that he was resting the case on behalf of the union people inasmuch as they were involved in the criminal proceedings and his clients were not required to testify in such an action.

Whereupon, the court said (R. 27):

"You also advised them to violate an order of the court, too."

To which the petitioner replied:

"I did."

The court then said:

"You did. That may go on to the record, that the attorney appearing for these four defendants having violated the temporary injunction issued by this Court, and that he also advised them now not to take the stand to purge themselves of that contempt. Is that correct?

The petitioner replied:

"I said, Your Honor, that I did not conceive that they could be called in a criminal proceedings to testify against themselves. I believe that this is a quasi-criminal proceedings, and that the law is clear in this matter."

Thereupon the court announced that the petitioner was in contempt. He said:

"All right, now, I will—we will proceed from there. It is very apparent from what you have said here this morning that you are in contempt of court. * * * You stand from what you said here this morning in contempt of court, very definitely."

(d) Administration of Justice Requires Lawyer Be Permitted to Honestly Advise.

A most important question in this case is whether a lawyer must bear censure, imprisonment, financial embarrassment or any other type of punishment at the hands of the court when he has, in good faith, after proper consideration of the status of the law, and with a conscientious interest in the welfare of his client, given advice to his client.

This is not to say that a lawyer may, with impunity, advise a client in a spirit of defiance or capriciously to flout the authority of the court. Nor is it to suggest that he

may do so without regard to the status of the law covering the matter upon which he is called for advice.

But, rather, it is to say that a lawyer, having been retained, having studied his client's problems, having researched the law as regards the problem, and having determined that, as here, in his opinion the court has no jurisdiction and has no intention of hearing that question, has two courses of conduct open to him.

The *first* is to abandon the pursuit of justice for his client.

The *second* course of conduct is, we believe, the correct one. The lawyer tells his client fully the status of the matter. He advises his client as to what may be done under the circumstances. He then represents his client as ably as he can *in the course which the client chooses.* Such conduct by the lawyer should not be condemned.

So have the courts held:

In *In Re: Watts,* 190 U. S. 1 (1902), this Court had before it a Writ of Habeas Corpus in favor of two attorneys, Watts and Sachs.

They had mistakenly arrived at the conclusion that the state court of Indiana which had first obtained jurisdiction over a corporation in receivership had jurisdiction superior to the Federal District Court in a subsequent involuntary bankruptcy action brought against the corporation. After a series of legal maneuvers employed by these attorneys and the state court in an attempt to stop the Bankruptcy Court from acting in the matter, Watts and Sachs were found in contempt by the Federal District Judge.

The Court, by Mr. Chief Justice Fuller, stated at page 28:

> "* * * we decline to entertain the suggestion that members of the bar can be intimidated in the discharge of their duty."

At page 29, in a totally dispositive statement the Court said:

> "* * * the essence of the alleged contempt was that, assuming that action was taken pursuant to the advice of these attorneys, they were liable to condemnation for giving such advice. In the ordinary case of advice to clients, if an attorney acts in good faith and in the honest belief that his advice is well founded and in the just interests of his client, he cannot be held liable for error in judgment. The preservation of the independence of the bar is too vital to the due administration of justice to allow of the application of any other general rule."

and at page 32:

> "They could not be found guilty because they believed and declared their belief that the State Court had jurisdiction and that the District Court had not. Granting that they were mistaken, it does not follow that their mistaken conviction constituted contempt."

The literature of attorney contempt is not great for the reason, we feel, that courts generally are loathe to reduce the efficiency of the Bar through fear. However, almost every case that is reported involving honest actions of lawyers vindicates, as did the *Watts* case, the dignity of the profession.

Examples are *May Hosiery Mills, Inc. v. U. S. District Court*, 64 F. (2d) 450 (1933), where the court stated:

> "We regard it as a somewhat novel proposition of law that parties and their counsel who, though misconceiving their legal remedies, lay, as here, all the facts fully and frankly before the court, should be adjudged in contempt merely because they 'guessed wrong'. We do not conceive that in such a case, punishment of the parties or of their counsel tends to vindicate the dignity of the court."

Caldwell v. The United States, 28 F. (2d), 684:

> "Thus suddenly to punish for conduct of doubtful propriety only where the intent to be insubordinate is not clear, might very well have the result of deterring an attorney of less courage and experience from doing his full duty to his client.",

and, *Schmidt v. The United States*, 115 F. (2d) 394, where the Court of Appeals, 9th Circuit, while recognizing that there might be a technical contempt under the facts therein (attorney advising procurement of affidavits from federal grand jurors who had sworn secrecy regarding matters before the jury), nevertheless reversed a conviction, holding:

> "Guilt in a criminal contempt must be established beyond a reasonable doubt. *Gompers vs. Bucks Stove and Range Co.*, 221 U. S. 418, 31 S. Ct. 492, 55 L. Ed. 797, 34 L. R. A., N. S., 874. Once established the penalty of such a judgment against an attorney is long lived.
>
> "It does not cease with the payment of a fine or with the discharge of a jail sentence, but, being inherent in the judgment, may arise to confront him throughout his professional career."

One of the strongest statements of the right of an attorney to freedom from fear of condemnation for his acts in good faith was laid down by an Ohio Appellate Court. In *Hunt v. State*, 5 O. C. C. (N. S.), 621 (1904), affirmed without opinion, 72 O. S., 643, attorneys had advised the violation of a rule of court which they felt was in derogation of the statute. On appeal from conviction of contempt, the court held:

> "And it seems to us that an attorney ought not to be regarded as in contempt of court, nor his client, if they in good faith believe that a rule in some way circumscribes the rights the law gives them and, thus

believing, proceed by ordinary legal methods to test its validity. And unless there is something very extraordinary about the case, calling upon the court to invoke this extreme course of proceeding to punish them, we regard contempt proceedings as quite inappropriate. *Haines v. Haines*, 35 Mich., 138; *Weeks v. Smith*, 3 Abb. PR. (N. Y.), 211.

"Obviously, an attorney who would refrain from thus proceeding, or who would induce his client to thus refrain, where he was acting in good faith and upon an honest belief that such action was necessary to preserve his client's interests or to maintain his own rights, an attorney who under such circumstances would fail to act, through fear of the consequences either in the way of disfavor upon the part of the judge or punishment by fine or imprisonment, would and ought to be branded as a craven and a poltroon, and he would be quite unworthy of his high commission as a member of the Bar. He would be recreant to the honorable traditions of the Bars of England and America, which bodies have always been in the van in every movement and effort to resist the tyrannical exercise of arbitrary power by government or its agents."

In affirming the decision of the Court of Appeals, the Ohio Supreme Court (R. 67) alludes to a statement made by the petitioner's associate, *not the petitioner*, as though it were a statement of the petitioner's intent to tell his clients to disobey the order of the court. The court, however, did not quote all of the language pertinent to that statement, leaving the inference, we fear, that it was a declaration of defiance by the petitioner. The whole statement was this (R. 40):

"*As our conversation neared its end, my associate told him that* regardless of the prior opinions of the court, respecting the validity of the contract that the court had no jurisdiction over this matter and that he was

forcing us to advise our clients * * * of their rights not to obey the order." (Emphasized portion omitted from court's quote.)

It appears that the above statement was attributed to the petitioner because immediately following the court's quotation (from the offer to prove), it went on to define contempt in this manner (R. 67):

"In its broad sense, contempt is a disregard of, or disobedience to, the order or command of a public authority, legislative or judicial. In its restrictive and more usual sense, contempt comprehends a despising of the authority, justice or dignity of a court; and one is guilty of contempt whose conduct is such as tends to bring the administration of the law into disrespect and disregard or otherwise tends to impede, embarrass or obstruct the court in the performance of its function."

We find no fault with this generalization of what amounts to contempt. However, we do not think the act of the petitioner in reporting the status of the Toledo case to his clients in Chicago and advising them of one possible way to get a court hearing falls within the description of contempt stated by the Supreme Court of Ohio.

(e) Court Decrees Silence or Contempt, Even Though Order is Vulnerable.

After this general description of contempt, the Ohio Supreme Court laid down a rule which, *if it is the law, will reduce the effectiveness of the legal profession to a state of impotency.* (R. 67.) The court said:

"An individual against whom an order of the court is directed may violate such order and properly urge in his defense in a contempt proceeding that the order is void."

The court then went on to say that a lawyer stands in a somewhat different position. "He has a duty", the court said, "to recognize and uphold the orders of the courts as long as the order stands", including, apparently, orders which are void:

> "Consequently", the court said, "*an attorney who brashly advises his client to disobey an existing court order is in contempt of court notwithstanding any vulnerability which may attach to such order.*" (Emphasis ours.)

So then we have this situation: If a lawyer correctly advises his client that an order issued by the court is void, the client may violate the order. The client may properly urge the fact that the order is void in his defense in a contempt proceeding. But if the lawyer gave his client that advice, even though one hundred percent correct, he is in contempt of court. He is denied the right to set up the void order as a defense.

Under the rule laid down by the Ohio Supreme Court, lawyers, even though aware that a court had issued a void order, would be forced into silence, because if they advised their clients of the fact that the order was void, they, the lawyers, would be guilty of contempt. The net result of such a state court rule is to deprive the lawyer of equal protection of law and the client of counsel.

Judge Younger, in his dissenting Ohio Court of Appeals opinion, drew a sharp and decisive distinction between acts of contempt and those acts which are proper. He said (R. 56):

> "In view of the above cases (Judge Younger here was referring to *Grimes and Hauer v. Pollock*, 163 O. S. 372, and *Richman Bros. Co. v. Amalgamated Clothing Workers of America, et al.*, 168 O. S. 560, which give reluctant recognition to the federal pre-emption of interstate labor disputes) and the decisions of the

Supreme Court of the United States upon which they are based, the petitioner, Merritt W. Green II, had a valid legal foundation for his opinion that the Common Pleas Court had no jurisdiction of the subject matter and had a valid arguable issue on the question as to whether or not the restraining order involved herein was void. It was his duty as a lawyer, therefore, in my opinion, to so advise the head of the Longshoremen's Union in Chicago and its general counsel in Chicago and such of the individual defendants as might ask him concerning the same."

In concluding his opinion Judge Younger said (R. 59):

"In my opinion there is a vast distinction between the actions of an attorney who is openly contumacious or rebellious over an order of the court and advises or aids and abets his clients in disobeying it, and the actions of an attorney who has a valid legal ground for believing the order of the court to be void for lack of jurisdiction and advises his client to resist the order, so that, in the orderly administration of justice, the question of the court's jurisdiction may be determined. This is especially so, where, as in this case, the opposing counsel and the court knew what was being done and the reason for it. I could not condone the one and I cannot condemn the other."

"I cannot conscientiously vote to find the petitioner guilty of contempt under these circumstances and I therefore dissent."

III. DUE PROCESS REQUIRES FULL HEARING BEFORE IMPARTIAL COURT.

In passing lightly over the question whether the petitioner was denied due process of law, there is good reason to believe that the Supreme Court "discovered" a way to circumvent the decisions of this Court by basing its decision more on a "point of view" rather than the decided cases.[14]

(a) Ohio Courts Exclude All Defense Testimony; Pre-Determination of Guilt Held Sufficient to Convict.

Both Ohio courts took the position that inasmuch as the petitioner had honestly told the court at the June 1st and June 3rd hearings of the advice he gave his client in

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[14] That the Ohio Supreme Court has a "point of view" relating to Federal vs. State jurisdiction in this area was made clear in the opening and closing paragraphs of the court's decision (also written by Zimmerman, J.) in *Richman Brothers Co. v. Amalgamated Clothing Workers etc.*, 168 O. S. 560 (1959) where the court said:

> "There are thinking citizens in the United States who view with concern and misgiving the steadily growing centralization of powers in the federal government and its agencies, and the alacrity with which those powers have been assumed and exercised. Noticeably, the several states are becoming less and less important in the over-all governmental scheme as they have either voluntarily or by compulsion relinquished prerogatives and transferred duties which were formerly theirs."
>
> * * * * *
>
> "In view of the sweeping decisions of the Supreme Court of the United States applying the National Labor Relations Act in a variety of circumstances, including those similar to the one existing here, *we can discover no other alternative than to affirm the judgment of the Court of Appeals.* If we are wrong in our conclusion, the Supreme Court of the United States, as our superior in a matter of this kind, may be afforded the opportunity of telling us so." (Emphasis ours.)

The judgment the court felt it was forced to affirm was one reversing a peaceful picketing injunction.

Chicago, a subsequent hearing was not necessary. The Ohio courts held that the lower court could take judicial notice of what took place at the hearings when the union members were on trial for contempt of the injunction order. Therefore, the courts held, no hearing or trial was necessary in the proceedings involving the petitioner after the filing of charges.

Even though the Court of Appeals went so far as to infer that in telling the court the truth the petitioner could be in direct contempt, the Common Pleas Court did consider the advice the petitioner gave his client as indirect contempt and for that reason filed written charges as provided in Sections 2705.02 and 2705.03 of the Revised Code of Ohio. (R. 29.)

The Supreme Court of Ohio apparently felt that the question of due process was hardly worth noticing even though the entire record of what took place on June 7th was brought to its attention. The court covered the whole due process question in one paragraph of its opinion in which it said (R. 69):

> "As to the hearing had on such charge on June 7, 1960 it was not conducted with the decorum and restraint it should have been, but to say it was of such a character as to deny appellant due process of law is hardly justified. The contempt had already occurred as disclosed in the hearing on June 1st and 3rd, and the Judge presiding over that hearing was the same Judge who issued the restraining order and who conducted the proceedings on June 7th."

Thus the Ohio Supreme Court holds that by reason of the predetermination of guilt, guilt determined at a hearing where the petitioner was not a party, a further hearing on June 7th was unnecessary. The court agreed with the Court of Common Pleas that the petitioner was not en-

titled to a trial or hearing and that the only thing before the court that day was the junishment to be meted out to the petitioner.

The material part of the June 7th proceedings revealing the predetermination of guilt by the court, the refusal of the court to grant a hearing or a trial, the refusal to permit the petitioner to testify, and the adamant position of the court that the petitioner was in court only for the purpose of being sentenced for guilt previously determined, begins at page 33 of the record:

"Mr. Green: Now, may I ask of the court what is conceded to be the posture of this case today?

The Court: He is in contempt of court, I told you.

Mr. Green: Has the court already—let me ask it this way—are we—is my client here only for the purpose of being sentenced for contempt that the court alleges that was found in him?

The Court: That is correct, Mr. Green.

Mr. Green: Well, then as I understand it, the only thing is is up here for his defense—

The Court: That's right; he is in contempt of court. I told him that repeatedly.

Mr. Green: Well that—

The Court: But he disregarded it.

Mr. Green: I want to know what is the procedure then, I want to know what procedure to follow.

The Court: The procedure is he is here in contempt of court. The court must punish him for contempt of court. I take it that you have consulted the courts on this matter earlier; I take it you have read the Supreme Court decisions on matters of contempt; I know your son didn't. I thought maybe you might.

Mr. Green: The only thing I am trying to find out, what are we here for today?

The Court: I repeatedly told you.

Mr. Green: Are we for hearing or trial or what?

The Court: You are not here for any hearing or trial.[15] You can not challenge the jurisdiction of this Court; that is gone, but you are here only on one thing, Mr. Green, and it must be clear to you that the court issued an order on May twenty-seventh and that order was disobeyed.

* * * * *

Mr. Green: So, prior to sentencing, in view of the fact that the court has already found him in contempt—[15]

The Court: That's right—

Mr. Green: In mitigation, that is all I can say, I am going to ask the respondent to be sworn, put under oath, and I think he has that right.

* * * * *

Mr. Green: And tell for the record under oath exactly what transpired from the very beginning of this case. I think he has that right, Your Honor, and I as counsel believe I have that right to speak on his behalf, or he can himself—and I will repeat exactly what he would testify to you under oath. I am asking that privilege so that the upper court will have before it all the facts pertaining to what—whether or not there was a request to dissolve this restraining order or whether the court's jurisdiction was not officially challenged and whether or not this Court could not—did not refuse and has refused right to this day to give us a hearing.

The Court: Oh, please, Mr. Green, don't follow in the same channel.

Mr. Green: I am not following in the same channel. I am asking the privilege of putting the respondent on the stand—[15]

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[15] Sec. 2705.05 Ohio Revised Code: "upon the day fixed for *the trial* in a contempt proceeding *the court shall investigate* the charge, *and hear any answer or testimony which the accused makes or offers. The court shall then determine* whether the accused is guilty of the contempt charge * * *." (Emphasis ours.)

The Court: No. The courts have made the pronouncement on that.

Mr. Green: I would—

The Court: You are too late for that. You are too late.

Mr. Green: I understand that the court is refusing counsel for the respondent and the respondent the right to any mitigation, because you have already found him in contempt? [15]

The Court: That's right.

Mr. Green: Without further hearing, without a trial. That you are refusing to let either counsel or the respondent show or say for the record in mitigation to this Court, everything that transpired—

* * * * *

Mr. Green: I would like to ask the court to answer that question; it is important.

The Court: I have told you that he is in contempt of court, repeatedly, in contempt of court, because he has stood before this Court on two or three occasions and told this Court that he was violating it and his clients were violating the order of the court.

* * * * *

Mr. Green: You mean to tell me that you are forbidding us to put into the record everything that transpired so that a higher court could determine the fact, whether a lawyer is guilty of contempt of court, whether he acted in a manner that was contemptuous?

The Court: Mr. Green, there is nothing before this Court on the theory that you now advance.

Mr. Green: But it has to be before the court, Your Honor.

* * * * *

Mr. Green: Yes; that is why we want to put it in the record because you see it would be hard to perfect

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[15] Footnote previous page.

an appeal—"At about 9:30 A. M. on the 27th day of May, 1960, I received a telephone call from Mr. Ed Doherty, Port Agent for the Seafarers International Union in Toledo who inquired as to whether I would be available to represent the I. L. A. in their labor dispute with the Toledo Marine Terminal."

The Court: This is the attorney, I understand, talking in their office, is that right?

* * * * *

Mr. Green: I am putting in the record what he would testify—

* * * * *

Mr. Green: This is being put in the record by way of an offer to prove because the court has refused to let us put it in otherwise.

The Court: I don't want the record cluttered up with a lot of irrelevant things which has no value to anybody, completely and wholly outside the point in question.

Mr. Green: Well, this is being offered in the nature of making up the record in view of the court's ruling that we have no right to put it in and we certainly have a right to preserve our record."

* * * * *

Following the reading into the record the testimony the petitioner would have given had he been permitted to testify, there was a discussion between the court and counsel for the petitioner, during which counsel suggested that if all the circumstances arising before and leading up to the advice the petitioner gave his clients was to be excluded from the contempt hearing, then the only thing left was for the court to complete what the court had already decided was the only thing before the court that day—punishment of the petitioner, to which the court responded—"That's right. At last you have arrived at the conclusion. That's all that's before the court." (R. 45.)

(b) Trial Court Ignores All Standards of Due Process Set by This Court.

After considering those facts from the record the question is: was the petitioner accorded due process of law in accordance with the standards which have been established by this Court?

In *Ex Parte Bradley*, 7 Wallace, page 364 (1868) a lawyer was disbarred because of a claimed contempt which was characterized as gross misbehavior in his office as an attorney generally. The lawyer and the Judge engaged in violent arguments throughout a trial. Later a citation was issued which ordered Bradley to show cause why he should not be punished for contempt of court.

Headnote two of the case says:

> "An attorney cannot be disbarred for misbehavior in his office as attorney generally, on the return of a rule issued against him for contempt of court, * * * without opportunity of a defense or explanation to the first named charge."

Due process, the court held, required that the lawyer be given an opportunity to be heard on the charge for which he was disbarred—the contempt.

In *Hovey v. Elliott*, 167 U. S. 409 (1897) the court said:

> "A court possessing plenary power to punish for contempt, unlimited by statute, has not the right to summon a defendant to answer, and then after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer or strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof and without hearing, on the theory that he has been guilty of a contempt of court."

Simon v. Craft, 182 U. S. 427 (1901) was a case where it was claimed that an Alabama court had denied the petitioner due process in failing to permit her to attend a lunacy hearing. Out of that case came this rule:

> "The essential elements of due process of law are notice and opportunity to defend, and in determining whether such rights are denied, the court is governed by the substance of things and not by mere form."

In *Jordan v. Massachusetts*, 225 U. S. 167 (1912) a juror in a case where the defendant was convicted and sentenced to death became insane after the verdict. A judicial inquiry disclosed that the juror was of sufficient mental capacity during the trial to act. This Court at page 174 said:

> "Subject to the requirements of due process of law, the states are under no restriction as to their methods of procedure in the administration of public justice."

and at 176:

> "Due process implied a tribunal both impartial and mentally competent for a hearing; * * *."

also at page 176 the Court pointed out that state courts must, however, provide an opportunity for hearing.

Providing an opportunity for a hearing, we submit, means more than providing by statute that a hearing be scheduled and means more than giving notice of a hearing and calling the court to order. Due process, we suggest, contemplates the right to give testimony and to call witnesses, as was not done in the petitioner's case. It also contemplates a trial by a court that has not predetermined guilt.

Ohio does provide by statute for the procedure to be followed in charging contempt and for the hearing on the

charge filed.[16] However, the fact that there is such a statute is of no consequence if the court denies the person so charged a complete hearing before guilt is determined.

As we have already said, the Ohio statutes did not deny the petitioner due process. It was in ignoring the positive requirements of the statute, and otherwise, that the petitioner was denied due process in that (1) he was found guilty in a proceedings where he was not a party but was serving as counsel; (2) charges of indirect contempt were filed against him *after* he had been found guilty of contempt; (3) on the day fixed for trial, the court did not investigate the charge but in fact refused to hear any answer or testimony which the petitioner offered; (4) in view of the court's pronouncement that there would be no trial or hearing, the petitioner was deprived of the right to call witnesses who were present to testify; (5) the statute provides that it is only after the court hears testimony, including that of the accused, that the court shall determine guilt.

In *Riverside and Dan River Cotton Mills v. Menefee*, 237 U. S. 189 (1915), this Court said, at page 103:

> "That to condemn without a hearing is repugnant to the due process clause of the 14th Amendment needs nothing but the statement."

In *Hebert v. Louisiana*, 272 U. S. 312 (1926) the petitioner was convicted of bootlegging. He claimed double jeopardy. At page 316 the Court said the 14th Amendment requires—

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[16] Section 2705.05 of the Ohio Revised Code provides for the procedure to be followed in cases arising under 2705.02 and 2705.03. It provides:

> "On the day fixed for the trial in a contempt proceeding *the court shall* investigate the charge and *hear any answer or testimony which the accused makes or offers.*"
>
> "*The court shall then determine* whether the accused is guilty of the contempt charged." (Emphasis ours.)

"That state action, whether through one agency or another, shall be consistent wtih the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'the law of the land.' "

"Those principles are applicable alike in all the states and do not depend upon or vary with local legislation."

In *Buchalter v. New York*, 319 U. S. 427 (1943) the Court citing *In re: Kemmler*, 136 U. S. 436, 448; *Caldwell v. Texas*, 137 U. S. 692, 697; *Hebert v. Louisiana*, 272 U. S. 312, 316; and *Lisenba v. California*, 314 U. S. 219, 236; *Moore v. Dempsey*, 261 U. S. 86; *Powell v. Alabama*, 287 U. S. 45; *Brown v. Mississippi*, 297 U. S. 278; *Avery v. Alabama*, 308 U. S. 444; among others, at page 429 said:

"The due process clause of the Fourteenth Amendment requires that action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of civil and political institutions, which not infrequently are designated as 'the law of the land.' Where the requirement has been disregarded in a criminal trial in a state court, this court has not hesitated to exercise its jurisdiction to enforce the constitutional guarantee."

In *Fay v. New York*, 332 U. S. 261 (1947) at page 288, citing *Palko v. Connecticut*, 302 U. S. 319, 327; *Mooney v. Holohan*, 294 U. S. 103, and *Moore v. Dempsey*, 261 U. S. 86, the court said:

"This court has construed it to be inherent in the independent concept of due process that condemnation shall be rendered only after a trial, in which the hearing is a real one, but not a sham or pretense."

After referring to *Tumey v. Ohio*, 273 U. S. 510, the Court pointed out that a trial must be held before a Judge

not biased by an interest in the event, and then at 294 said this:

> "The function of this Federal Court under the Fourteenth Amendment in reference to state juries is not to prescribe procedures but is essentially to protect the integrity of the trial process by whatever method the state sees fit to employ."

The 14th Amendment, the Court said, requires conformity to standards of fundamental fairness that have won legal recognition.

Another of the important cases decided by this Court in a somewhat parallel situation to the one of petitioner is that of *Cooke v. United States*, 267 U. S. 517 (1929) where the court held that even though knowledge of the alleged contempt be acquired from the confession of the accused, those facts would not justify conviction without a trial in which there was an opportunity for a defense. At page 537 the court said:

> "Due process of law, therefore, in the prosecution of contempt, except that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if desired, and the right to call witnesses to give testimony relevant to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty being imposed."

The lower court in the *Cooke* case proceeded on the theory that the admission by the petitioner, a lawyer, that he had written a letter to the court in which he expressed bitter criticism of a decision rendered by the court, foreclosed evidence or argument. This Court said at page 538:

> "That in cases like this, where the intention with which acts of contempt have been committed must neces-

sarily and properly have important bearing upon the decree of guilt and penalty which should be imposed, the court cannot exclude evidence in mitigation. It is a proper part of defense."

In 1948 this Court again considered this question in *In Re: Oliver,* 333 U. S. 257.

There the petitioner appeared as a witness before a Michigan Circuit Judge who was then conducting a secret one-man Grand Jury investigation of crime. After the petitioner had given certain testimony, the Judge-Grand Jury, acting in the belief that the testimony was false and evasive, summarily charged him with contempt, convicted him, and sentenced him to sixty days in jail.

At page 273, after holding that failure to afford the petitioner a reasonable opportunity to defend himself was a denial of due process of law, the court said that a person's right to a notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; that these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and be represented by counsel.

The court, referring to *Cooke v. United States,* 267 U. S. 517, *supra,* went on to say this (page 275):

"* * * due process of law as explained in the Cooke case requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation."

The Court then pointed out that the narrow exception to these due process requirements includes only charges

of misconduct, in open court, in the presence of the Judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent "demoralization of the court's authority" before the public.

The court, at page 278, restated a familiar rule of law which it had previously stated in *Chambers v. Florida*, 309 U. S. 227:

> "It is 'the law of the land' that no man's life, liberty or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal."

Then in 1955 this Court further elaborated upon the essential elements of due process as laid down in *Cooke v. United States*, 267 U. S. 517, and *In Re: Oliver*, 333 U. S. 256, in the case of *In Re: Murchison, et al.*, in 349 U. S. 133.

This was another one-man Grand Jury proceeding coming out of the State of Michigan. The Judge who was serving as the one-man Grand Jury, after hearing testimony from two witnesses, cited Murchison, a police officer, for contempt. Later, the same Judge, after a hearing in open court, adjudged Murchison guilty of contempt.

The question before the court in *Murchison*, page 134, was whether a contempt proceeding conducted in accordance with the standards used complied with the due process requirement of an impartial tribunal where the same Judge presiding at the contempt hearing had also served as the "one-man Grand Jury" out of which the contempt charges arose.

In deciding *Murchison* the court pointed out that the question before the court did not involve the powers of

courts summarily to punish certain conduct occurring in open court.

At page 136 the court said:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome."

In pointing out that that interest cannot be defined with precision, the court quoted from *Tumey v. Ohio*, 273 U. S. 510, 532, where it said:

> "Every procedure which would offer a possible temptation to the average man as a Judge * * * not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law."

Then the court went on to point out that a Judge who accuses one charged with contempt cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused (page 137) and while the Judge may not have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal.

> "Fair trials," the court said, "are too important a part of our free society to let prosecuting Judges be trial Judges of the charges they prefer."

Weighing the pronouncements of this Court against the facts in the record relating to the June 7th proceeding, the inescapable conclusion is that the petitioner was deprived of his liberty without due process of law and was denied equal protection of the law.

CONCLUSION.

In view of the foregoing facts and authorities, we earnestly suggest that the lawyer here did not contemptuously, brashly or irresponsibly advise, counsel, order, tell, or instruct his clients to disobey, ignore or violate a *lawful* order of the Court of Common Pleas.

What he did do was refuse to abandon his clients and their rights under law. Being convinced, and correct in his convictions, that the court had been duped by the plaintiff into believing that the action filed was within the court's jurisdiction, this lawyer diligently and properly continued his quest for justice for his clients, as was his duty.

It is obvious too, that an attempt was being made to "use" the power of the Court to break a strike then in progress. We say this for the reason that the assumption of jurisdiction by the Court because of "Detroit hoodlums" had to be inspired by counsel for the plaintiffs. (R. 38, 40.)

We say in all frankness that if the Court of Common Pleas was in any way offended against, it was not by reason of any act of the petitioner but was the result of being misled by the plaintiff. If anyone has been in contempt of court in contemplation of law, and we think no one has, but if anyone has been, it would be only those who prevailed upon and misled the Court into an area where it had no legal right to exercise its judicial powers.

We sincerely and firmly believe that the petitioner should be discharged from custody and recover all his costs. The many reasons hereinbefore set forth establish

that detention has been and any continuance thereof would be unlawful.

Respectfully submitted,

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Office-Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 312.

IN THE MATTER OF THE PETITION FOR A WRIT OF HABEAS CORPUS FOR MERRITT W. GREEN II, PETITIONER.

BRIEF OF RESPONDENT, LUCAS COUNTY, OHIO.

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Constitution.

No portion of the Constitution of the United States is quoted specifically in this Brief. From time to time reference is made to the Constitution by using the expressions "due process of law" or "constitutional rights."

Statutes.

No statute is directly cited in this Brief. A law review annotation in 106 *Univ. of Pennsylvania L. R.* 1070 refers to Section 301(a) of the Taft-Hartley Act (See above table of authorities under heading, "Law Review Annotations").

In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 312.

IN THE MATTER OF THE PETITION FOR A WRIT OF HABEAS CORPUS FOR MERRITT W. GREEN II, PETITIONER.

BRIEF OF RESPONDENT, LUCAS COUNTY, OHIO.

REPORTS OF OPINIONS IN LOWER COURTS.

The statement of the petitioner on the first page of his brief is correct, except that the opinion of the Supreme Court of Ohio is also printed in 175 Northeastern Reporter, Second Series, page 59 and in 15 Ohio Opinions, Second Series, page 449.

JURISDICTION.

The statement of the petitioner on the first page of his brief is correct.

CONSTITUTIONAL PROVISIONS, STATUTE AND RULE OF COURT INVOLVED.

The petitioner's statement with respect to constitutional provisions and statutes is correct. To them also is added the following portion of Section 1 (f) of Rule 23 of the Revised Rules of this Court, namely,

> "If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed

were raised; the method of raising them (e.g. by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g. ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal questions was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

QUESTIONS PRESENTED FOR REVIEW.

1. May a petitioner for a writ of certiorari ask this Court to review the judgment of a state court if he has failed to comply with that portion of section 1 (f) of Rule 23 of the Revised Rules of this Court which require him to specify the stage in the proceedings in the state courts, and the manner, in which the federal question was timely and properly raised?

2. May a state court enjoin a union from picketing where there is danger to life, limb or property even though an unfair labor practice charge has been filed with the National Labor Relations Board by the union?

3. May a state court issue a temporary order restraining members of a labor union from violating a no-strike clause in a collective bargaining contract between the union and the employer-corporation even though an unfair labor practice charge has been filed by the union with the National Labor Relations Board?

4. May a state court, when presented with a case, determine whether it has jurisdiction to proceed; and while it is considering such question issue an order which counsel

must obey even though it may be decided thereafter that such court actually had no jurisdiction to hear the case on the merits?

5. After an attorney for one of the parties to an action in a state court has admitted in open court that he has advised his client to disobey an order made by such court and that he will continue so to advise his client, may such court summarily find him to be guilty of contempt; and, at a later hearing wherein such attorney is himself represented by counsel, impose sentence upon him, without impairing his constitutional rights?

STATEMENT OF THE CASE.

On May 26, 1960, Toledo Marine Terminals, Inc. (the employer) entered into a collective bargaining contract with Local 1317-A of the International Longshoremens Association (the Union) (R. 13-15). Such Local 1317-A had been certified as the bargaining representative of the employees (R. 17, bottom). The agents who signed the contract on behalf of the union had authority to do so (R. 17-18). Although the opening paragraph refers to May 24, 1960 (R. 13), the contract actually was signed on May 26 (R. 15). On June 7, the petitioner's counsel admitted that an unfair labor practice charge growing out of an alleged breach of such contract was pending before the National Labor Relations Board (R. 45). This contract contained a "no-strike" clause (R. 11, top three lines). On May 27, 1960, the union began to picket the employer's place of business. The employer immediately filed in the Court of Common Pleas of Lucas County, Ohio, a petition in which, among other things, it alleged danger to life, limb and property (R. 11). It asked for a temporary restraining order to forbid such picketing,

pending a final hearing, at which time such temporary restraining order should be made permanent (R. 11-12). Service was made upon the representatives of the union (R. 18-19). The court issued such restraining order (R. 18). The union disregarded the order and continued to picket the premises (R. 19).

On June 1, the Court of Common Pleas, which is a court of general jurisdiction (R. 67, bottom), conducted a hearing to determine whether the union officials were guilty of contempt for violating the restraining order (R. 17 et seq.). In the course of the hearing, the present petitioner, Merritt W. Green II, who was the attorney for the union, objected to the jurisdiction of such court since he said that an unfair labor practice charge had been filed with the National Labor Relations Board (R. 19). In response to questions by the court, the petitioner said that the union had been told by him to violate the "no-picketing" order of the court (R. 23). He explained to the court that if the union had obeyed the order and waited to have the whole matter determined on a final hearing, the union officials would have had to give up the only vital right they had to bargain (R. 24, bottom).

The hearing was continued until June 3. On that day in response to questioning by the court, the petitioner again admitted to the court that he himself had advised his clients to violate the "no-picketing" order (R. 27). The court then told him that he was in contempt (R. 28). The petitioner answered as follows: "Your Honor, I have taken the only course open to me, but I don't feel that we are in contempt of Court. I don't want to discuss that at this time, I am not concerned with that at all" (R. 28).

On June 6, the court filed a Charge in Contempt against the petitioner, reciting that he had advised his clients to disobey the restraining order, that they, acting

on his advice and counsel, had violated the order, and that the petitioner, after being notified by the judge in open court that he was in contempt of court, "did and does continue" to advise the union officials to continue to disobey the order (R. 29-30).

On June 7, the court conducted a hearing upon the proceeding in contempt against the petitioner (R. 30 *et seq.*). Such hearing did not concern the union officials.

At this hearing the petitioner was represented by counsel. [NOTE two things, namely, 1. When the stenographer refers to "Mr. Green" on the occasion of this June 7 hearing, he means Mr. Merritt W. Green, the father of the petitioner, and one of the petitioner's counsel. When he refers to "Mr. Green" on the occasion of other hearings, he means Judge Merritt W. Green II, who is the petitioner in this present proceeding on certiorari. 2. Throughout the hearing on June 7, Merritt W. Green II, the petitioner in this present proceeding on certiorari, was referred to as "the respondent" since he was the respondent in the contempt proceedings, which were separate and distinct from the habeas corpus proceedings.] The court refused to allow the petitioner to testify on June 7, but, at the request of his counsel (R. 35), allowed his counsel to read a prepared statement which included what the petitioner would have testified if he had been permitted to take the stand (R. 34-45). In this statement, the petitioner told in detail of the various steps which had culminated in the Charge in Contempt. Nowhere in such statement did he deny that he had advised the union officials to violate the order. On the contrary, he said that at a meeting between the judge, the respondent and the respondent's associate, the associate had told the judge that "regardless of the private opinions of the court respecting the validity of the contract that the court had no jurisdiction over this

matter and that he was forcing us to advice (sic) our clients * * * of their rights not to obey the order" (R. 40, center; 67, top). He also told the judge on another occasion "that the position of the union was that the persons who signed the agreement had no authority to do so and further suggested that the court had no jurisdiction" (R. 38, lower half of page). Among other matters, he said that he had received a telephone call from counsel for the union at its headquarters in Chicago, telling him that the heads of the union had decided to continue picketing notwithstanding the court order. In the words of the petitioner, he "thereupon called the union hall and told them of the decision of the officials and asked them to communicate this information to the pickets" (R. 41, bottom). In his statement, the petitioner said that he had told the court that he had a motion to vacate the restraining order prepared and would file it immediately if he could obtain an early hearing, but that the court had refused to hear the motion until the restraining order was obeyed (R. 43). At the end of this June 7 hearing, the court fined the petitioner $500 and also sentenced him to confinement for ten days in the Lucas County Jail (R. 46).

On June 7 the petitioner filed a petition for habeas corpus in the Ohio Court of Appeals, Third District, sitting in Lucas County, Ohio. On November 1, 1960, the petitioner's release was denied by the Court of Appeals (R. 48, 55). On November 18, he filed notice of appeal to the Ohio Supreme Court (R. 48). On May 17, 1961, the Ohio Supreme Court affirmed the judgment of the Ohio Court of Appeals, thereby deciding that the sentence for contempt was valid. (R. 61, 69). Thereafter the petitioner filed his present petition for a writ of certiorari in this Court (R. 71), which granted the writ on November 6, 1961.

In his oral argument before the Common Pleas Court on June 1 and June 3, 1960, the petitioner questioned the jurisdiction of such court to issue the restraining order, giving as his reason his statement that an unfair labor practice charge had been filed by the union with the National Labor Relations Board (R. 19-20; See also R. 24, 26). In the oral argument on June 7, counsel for the petitioner raised the same objection to the jurisdiction of the court (R. 33, 45). In the petitioner's written statement which his counsel was permitted to read during the hearing on June 7, the petitioner raised the same objection to the jurisdiction of the court (R. 37-38, 41-44).

There is nothing to indicate that the petitioner at any time during the hearings in the Common Pleas Court on June 1, June 3 and June 7, ever raised the question of "due process" with respect to the way in which his own "contempt of court" hearings were being conducted in such court. It should be remembered that such proceedings in the Common Pleas Court were part of the original cause No. 188631, *Toledo Marine Terminals, Inc. v. I. L. A. Local 1317-A,* (R. 3, bottom; R. 8 *et seq.*). They had nothing to do with the proceedings in Habeas Corpus which this Court is now reviewing and which was begun in the Ohio Court of Appeals and not in the Common Pleas Court.

During the hearing on June 9, 1960, before the Ohio Court of Appeals upon the petitioner's application for a writ of habeas corpus, the record shows that in the course of his oral argument, he again raised the question of lack of jurisdiction of the Ohio court to issue the restraining order (R. 3-5). He did not raise any question as to whether his own "contempt of court" case had been conducted so as to deprive him of his constitutional right to due process of law (R. 2-7).

The respective opinions of the Ohio Court of Appeals (R. 48-55) and of the Ohio Supreme Court (R. 63-69) indicate that the defenses of lack of jurisdiction to issue the restraining order and of due process of law were raised somewhere along the line. Neither opinion gives any indication as to how, when or where either of these defenses was raised.

The charge of "unfair labor practices" which had been filed with the National Labor Relations Board and which was the basis of the petitioner's objection to the jurisdiction of the Common Pleas Court, contained only vague charges that the employer had refused to bargain collectively, although in fact negotiations had been under way almost continuously (R. 3). Such "unfair labor practices" charge was not based upon the collective bargaining agreement between the employer and the union (R. 3). Such unfair labor practices charge had already been dropped prior to the first habeas corpus hearing on June 9 (R. 3).

The Common Pleas Court on June 3, when it found the petitioner guilty of contempt, told him that he ought to select a lawyer to represent him and that if he did not do so, the court would appoint one (R. 28-29).

SUMMARY OF ARGUMENT.

I.

Since the petitioner has not specified, in his statement of the case the stage in the proceedings or the manner in which either of his federal objections (i.e. (1) lack of jurisdiction in the state court because of charges before the National Labor Relations Board; and (2) failure by the trial court to protect his constitutional right to "due process of law" in the contempt proceedings), he has therefore failed to comply with the requirements of section 1 (f) of Rule 23, Revised Rules of this Court. Therefore this Court should refuse to consider either of such objections at this time and should not permit the petitioner to argue upon either question.

II.

Even though an unfair labor practices charge has been filed with the National Labor Relations Board, a state court may enjoin picketing where there is danger that it will result in danger to life or limb or damage to property. *Youngdahl v. Rainfair, Inc.*, 355 U. S. 131.

III.

The state court did not lose its jurisdiction to forbid the violation of the "no-strike" clause in the collective bargaining contract simply because an unfair labor change had been filed with the National Labor Relations Board. Congress has never taken away from the states the power to enforce such a contract. Breach of such a contract is not an "unfair labor practice." Authority to settle a dispute concerning such a contract has not been vested in the National Labor Relations Board. *Association of Westinghouse Employees v. Westinghouse Electric Corporation*, 348 U. S. 437, footnote 2 on pages 443-444.

IV.

A court of general jurisdiction has a right to determine its own jurisdiction in a given case. When at the beginning of an action it issues a temporary order, the parties before the court, including the attorneys, must obey such order, even if such order is later found to be beyond the jurisdiction of the court. This doctrine applies to any court, state as well as federal. *Howat v. Kansas*, 258 U. S. 181.

V.

An attorney who, in open court, tells the court that he has already advised his client to violate an order of the court and that he intends to continue giving such advice, is guilty of direct contempt and may be punished summarily by the court. *Sacher v. United States*, 343 U. S. 1. But even if his contempt be considered to be indirect, he has not been deprived of his constitutional rights under the facts of this case. The cases of *Cooke v. United States*, 267 U. S. 517, *Re Oliver*, 333 U. S. 257, and *Re Murchison*, 349 U. S. 133, are distinguished.

ARGUMENT.

I.

NON-COMPLIANCE WITH RULE 23, REVISED RULES.

Section 1(f) of Rule 23 of the Revised Rules of this Court reads in part as follows, namely,

> "(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g. ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

The petitioner bases his claim upon two federal questions, namely,

> 1. Whether the power of a state to issue an order restraining the picketing of an employer has been curtailed by Congress and such power vested in the National Labor Relations Board; and
>
> 2. Whether under the facts of this case he has been denied due process when he was summarily adjudged to be in contempt of court.

According to the above Rule 23, he should have specified in his statement of the case the stage, the manner and the method, in the proceedings in the court of first instance (the Ohio Court of Appeals) and in the appellate

court (the Ohio Supreme Court) at and in which each of these questions was raised.

He has shown none of these things in his brief with respect to the due process question. With respect to the question of the conflict of jurisdiction between the state court and the National Labor Relations Board, his brief shows that in the initial hearing before the Ohio Court of Appeals (the court of first instance) upon his petition for a writ of habeas corpus, he orally raised such point (Brief 6, 19). His brief is silent as to how or when he raised this question in the Ohio Supreme Court, which was the appellate court which reviewed his petition for a writ of habeas corpus. It should be remembered that this Court is now reviewing only the Habeas Corpus case, which is collateral to and not a part of the original proceedings in contempt.

The above portion of Rule 23 is not a recent invention of this Court. It simply restates what has long been settled by judicial decision, namely, that a litigant who wishes an upper court to review a case which he has lost in the lower court shall be limited in his argument to points which he raised in the lower court. "The benefits of hypothetical defenses, never raised below or pressed upon us are not to be involved in the abstract." *Beauharnais v. Illinois*, 343 U. S. 250. Furthermore, the burden of establishing these matters rests affirmatively upon the petitioner. *Republic Natural Gas Co. v. Oklahoma*, 334 U. S. 62.

Since the petitioner has not complied with the foregoing Rule 23, this Court should not permit him to offer any argument, whether by means of his brief or orally, upon either of these federal questions.

II.

A. A State Court May Enjoin Picketing Where There is Danger to Life, Limb or Property Even Though an Unfair Labor Practices Charge Has Been Filed With the National Labor Relations Board.

The basic principle that a state court may enjoin picketing to prevent violence or mass picketing, is admitted by the petitioner on pages 24 and 43 of his brief. He cites *Union Carpenters Local v. Laburnum*, 347 U. S. 656; *Youngdahl v. Rainfair, Inc.*, 355 U. S. 131, and *United Automobile Workers v. Russell*, 356 U. S. 634 (not *United Oil Workers v. Rochelle*, 356 U. S. 656, as appears on page 43 of his brief).

The only difference of opinion with respect to these cases lies in the difference of the meaning of "violence."

B. A Court Need Not Wait Until Violence Breaks Out Before it Issues Injunction.

The employer, the Toledo Marine Terminals, Inc., in its original petition against the union, alleged that unless the court were to issue an injunction, the picketing would "result in danger to life and limb of the employees of plaintiff company and irreparable loss and damage to property of plaintiff company" (R. 11).

This is enough to justify the court in taking preventive steps. It is better to prevent violence from erupting than to stand by until it has broken out. The petitioner contends that "the petition upon which the ex parte injunction was issued did not contain an allegation of one fact relating to mass picketing or picketing accompanied by violence or intimidation" (Petitioner's Brief, 40). That is true, but it is probably true only because the restraining order anticipated such violence and prevented it from happening.

When confronted with a situation like the one which existed at the beginning of the employer's action against the union, a court must exercise its sound discretion to determine whether the complaining employer is entitled to ex parte relief. That does not mean that the jurisdiction of the court falls to the ground if the court guesses wrong. In the nature of things, the court must determine then and there at the outset of the employer's action whether to issue a restraining order. The only way in which it can make an intelligent determination is to survey the facts as they appear at that moment, and to make its own estimate of the situation. If such survey convinces the court that violence is reasonably likely to occur, then the court has a right to issue the order. This right is not destroyed retroactively when at a later date the court looks back and sees that the violence never happened after all.

As a matter of fact, no one can show at this late date that the trial court did make a mistake when it issued the original restraining order. It is perfectly reasonable to say that the restraining order prevented the violence from happening, and that had no order been issued, violence would have happened.

III.

A. A State Court May Enforce a Collective Bargaining Contract.

Since Congress has never authorized the National Labor Relations Board to enforce a collective bargaining agreement, the state courts retain jurisdiction over it as they do over any ordinary contract.

> "It is significant, however, that breach of contract is not 'an unfair labor practice'. A proposal to that end was contained in the Senate bill but was deleted in conference with the observation: 'Once parties have

made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board.' (H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 42)." *Association of Westinghouse Employees v. Westinghouse Electric Corp.*, 348 U. S. 437, footnote 2 on pages 443-444.

The above quoted *Westinghouse* case was decided in 1955. That this Court saw no reason later to modify the above quotation may be shown by the fact that as late as June 22, 1959, this Court denied a writ of certiorari to review the decision of the Supreme Court of Minnesota in a case involving the same basic issue. In *McLean Distributing Company v. Brewery and Beverage Drivers Local*, 254 Minn. 204, 94 N. W. 2d 514, 521, the Minnesota Supreme Court said:

> "A strike in violation of a contract not open to renegotiation during its term is not an unfair labor practice under the National Labor Relations Act. It is declared to be such under M. S. A. sec. 179.11(1). A number of state courts have held that under conditions such as we have here the state may entertain jurisdiction." (Citing cases.)

Had this Court felt that the above words of the Minnesota Supreme Court were wrong, it could have reviewed the *McLean* case by means of certiorari. The fact that it denied the writ as late as 1959, in 360 U. S. 917, indicates that it considered such quotation to be a fair statement of the law.

B. The Present Collective Bargaining Contract Bound the Union.

Since the record contains nothing to indicate any defect in the execution, the form or the contents of the collective bargaining contract between the employer and the union, it must be accepted as valid and binding upon both parties. The skeleton of the contract is set forth in the Record (R. 13-15). It was executed on May 26, 1960, between two parties, namely, Toledo Marine Terminals, Inc. (the Company) and The International Longshoremen's Association AFL-CIO, Local 1317-A (the Union) (R. 15). It was signed by each of the two parties by means of their respective human representatives. At the end of the document in the place reserved for signatures of the parties, the record indicates that a third name was printed, namely,

> "The International Longshoremen's Association, AFL-CIO
> By (Not signed)

No explanation appears in the record why this third unsigned name appears but that is immaterial since only the certified bargaining representative is a necessary party. *National Labor Relations Board v. Borg-Warner Corp.*, 356 U. S. 342, 350. The International Longshoremen's Association, AFL-CIO, was not a party to the contract (R. 13, top). Therefore an unfilled blank signature of its name was mere surplusage. The contract was between the certified bargaining representative, Local 1317-A of the International Longshoremen's Association, and Toledo Marine Terminals, Inc. (R. 13, top; 17, bottom). No third party, such as the National Headquarters of the Association, was involved. Nowhere is there anything in the record to indicate that the National Headquarters of the union

had anything to do with the contract. The petitioner states that the contract was not a completed contract but does not explain his meaning (Petitioner's Brief, 4, 44). The record, on the contrary, shows that it was complete since it was signed by the only two persons who were parties to it, namely, Toledo Marine Terminals, Inc. (the employer) and Local 1317-A (the union). Furthermore, there is nothing in the record to show that the signing was *ultra vires* as to either party or that the agents of either party lacked authority to sign the names of their respective principals, although the petitioner makes an unsupported charge to that effect in the prepared statement which his counsel read at the hearing on June 7 (R. 38, lower part of page). On the contrary, they had authority to sign on behalf of the union (R. 18).

C. Since Congress Never Deprived the Ohio Court of Its Jurisdiction to Enforce Such a Contract, the Restraining Order Was Valid Even Though the Picketing Was Peaceful. The Petitioner's Citations Are Not in Point.

What has been said under parts A and B of this Argument III, necessarily leads to the conclusion that the Ohio court could restrain a threatened breach of this contract even though such breach did not involve any violence, intimidation or mass picketing.

The petitioner cites a number of cases in support of his contention that a "State Court Has No Jurisdiction Where Labor Dispute is Arguably or Potentially Subject to National Labor Relations Board Jurisdiction" (Petitioner's Brief, 42 *et seq.*) None of these cases is in point, in that none involves enforcement of a collective bargaining contract.

Union Carpenters Local v. Laburnum, 347 U. S. 656, was essentially a tort action for damages because of vio-

lence growing out of an attempt by the union to organize the workers. No collective bargaining contract was involved.

Youngdahl v. Rainfair, Inc., 355 U. S. 131, did not involve any collective bargaining contract. The state court had authority to enjoin violence growing out of an attempt by union to organize the workers but it went too far when it enjoined peaceful picketing.

Automobile Workers v. Russell, 356 U. S. 634 (not *United Oil Workers v. Rochelle*, 356 U. S. 656, as it appears on page 43 of petitioner's brief) was essentially a tort action for damages because of threats of violence and mass picketing. No collective bargaining contract was involved.

Garner v. Teamsters, Local No. 776, 346 U. S. 485, did not involve any collective bargaining contract. A Pennsylvania court had no jurisdiction to enjoin peaceful picketing.

Weber v. Anheuser-Busch, Inc., 348 U. S. 468 (not 348 U. S. 478, as appears on page 43 of petitioner's brief) did not involve any such contract. A Missouri court had no right to enjoin a peaceful strike which grew out of a dispute between two unions.

Guss v. Utah Labor Relations Board, 353 U. S. 1, involved the power of the National Labor Relations Board to decline to exercise jurisdiction. No collective bargaining contract was involved.

Amalgamated Meat Cutters v. Fairlawn Meats, Inc., 353 U. S. 20, did not involve any collective bargaining contract. The Ohio court had no right to enjoin peaceful picketing.

San Diego Building Trades Council v. J. S. Garmon is in two decisions, 353 U. S. 26 and 359 U. S. 236. Both

are important cases, especially the second one; but they do not involve any collective bargaining contract. A California court had no right to enjoin peaceful picketing or to award damages. The case grew out of an attempt by a union to organize the workers.

In like fashion none of the earlier cases which the petitioner cites on page 41 or 42 of his brief discusses the effect of a collective bargaining contract upon the matter of state jurisdiction. *Amalgamated Association v. Wisconsin Board*, 340 U. S. 383, simply grew out of a state statute which abrogated the right to strike against public utilities. *La Crosse Telephone Corporation v. Wisconsin Board*, 336 U. S. 18, declared that a state board might not exercise jurisdiction to determine the appropriate bargaining representative of employees whose employer was engaged in interstate commerce. *Bethlehem Steel Company v. New York Board*, 330 U. S. 767, laid down the rule that foremen who were unable to organize under the federal statute because of a policy of the National Labor Relations Board, could not do so under a state statute. *Plankington Packing Company v. Wisconsin Board*, 338 U. S. 953, contained a *per curiam* memorandum wherein this Court reversed the lower court on the authority of the *La Crosse* case and the *Bethlehem Steel case*, above cited, without further explanation. *Hill v. Florida*, 325 U. S. 538, declared that Florida lacked authority to require that business agents of labor unions be licensed by the state.

It thus appears that all of the cases cited on pages 41-44 of the petitioner's brief have this in common:

> They did not involve any enforcement of a collective bargaining contract.

They therefore are inapposite and have no value as support for his contention that in the present case the Ohio

court had no jurisdiction to enjoin picketing which violates such a collective bargaining contract.

In the present case, there was such a contract and it contained a "no-strike" clause (R. 11, top). The petitioner himself admitted in open court that the original action was brought by the employer against the union to enforce such "no-strike" clause (R. 19). He further admitted on June 7 through his counsel, that an unfair labor practice charge arising out of an alleged breach of this contract was then pending before the National Labor Relations Board (R. 45). Since the enforcement of such a clause has never been vested by Congress in the National Labor Relations Board, but remains where it always was, namely, in the States themselves, therefore the Ohio court had jurisdiction to issue the restraining order.

An excellent discussion of the foregoing subject may be found in an annotation to *McCarroll v. Los Angeles District Council*, 49 Calif. 2d 45, 315 Pac. 2d 322, certiorari denied on January 27, 1958, 355 U. S. 932, which appeared in the University of Pennsylvania Law Review for May, 1958, (106 *U. of Pa. L. R.*, 1070), entitled: "State Court may grant specific performance of no-strike clause under Section 301 (a) of Taft-Hartley Act." See also "Reflections upon Labor Arbitration" by Archibald Cox, 72 *Harvard Law Review*, 1482 at 1485.

IV.

THE OHIO COURT, WHEN ASKED TO ISSUE A RESTRAINING ORDER, HAD A RIGHT TO DETERMINE ITS OWN JURISDICTION. PENDING SUCH DETERMINATION, THE PETITIONER WAS OBLIGED TO OBEY SUCH ORDER.

The leading case on this point is *United States v. Shipp*, 203 U. S. 563. On page 573, this Court said:

> "But even if the Circuit Court had no jurisdiction to entertain Johnson's petition, and if this Court had no jurisdiction of the appeal, this Court, and this Court alone, could decide that such was the case. It and it alone necessarily had jurisdiction to decide whether the case was properly before it * * *. Until its judgment declining jurisdiction should be announced, it had authority from the necessity of the case to make orders to preserve the existing conditions and the subject of the petition * * *."

After the *Shipp* case, this Court reiterated the rule that a court has authority to decide whether it has jurisdiction in this kind of a situation, and that pending such decision people must obey its orders. *Toy Toy v. Hopkins*, 212 U. S. 542, 548; *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 450. The *Shipp* case was decided in 1906. That it continued to represent the rule of this Court may be seen from *United States v. United Mine Workers of America*, 330 U. S. 258, decided in 1947. In this latter case, on page 291, this Court quoted with approval the above passage from the *Shipp* case.

The petitioner, on pages 35 to 39 of his brief, argues that neither the *Shipp* case nor the *United Mine Workers* case is controlling in the present situation. He argues that they are limited to a situation wherein the court has jurisdiction over the subject matter and issues an injunc-

tion which is only ancillary to the main relief sought. That the petitioner is wrong in thus limiting the decisions in the *Shipp* case and the *United Mine Workers* case is clearly shown by the case of *Howat v. Kansas*, 258 U. S. 181, decided in 1922. The petitioner does not mention the *Howat* case, although this Court, in the *United Mine Workers* case (330 U. S. 258 at 293), quoted with approval the following long passage from the *Howat* case, namely,

> "An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished" (258 U. S. 181, on pages 189-190).

This quotation appears on pages 189-190 of 258 U. S. It is quoted with approval in the *United Mine Workers* case on page 293 of 330 U. S.

The limitations which the petitioner suggests on pages 35 to 39 of his brief, do not exist in the *Howat* case. The *Howat* case grew out of a sentence for contempt imposed by a Kansas state court. The state court had issued an injunction to prevent a general coal strike which would have violated Kansas state law. A violation of such injunction caused such Kansas court to impose a sentence for contempt. The Kansas Supreme Court affirmed such

sentence. This Court approved the action of the Kansas Supreme Court in the above quoted passage.

In the present case, the Ohio court actually did have jurisdiction to issue the initial restraining order and therefore the precedent of the *Howat* case is unnecessary. The plaintiff prayed "that upon final hearing said restraining order be made permanent" (R. 12, bottom). The plaintiff's petition was verified, i.e., sworn to (R. 65, center). But even if the Ohio court had lacked jurisdiction to issue such order because it had been vested in the National Labor Relations Board, the above language of the *Howat* case would have applied to the present case.

Here, as in the *Howat* case, the court was a court of general jurisdiction with equity powers (R. 63, second headnote, together with the rest of the opinion of the Ohio Supreme Court in this proceeding). The pleadings properly invoked its action (R. 8-12). The parties were served and were before the court (R. 18-19). The agents of the union local who signed the contract on its behalf had authority to do so (R. 17-18). The local was the certified bargaining representative (R. 17, bottom). When the Ohio Court issued the restraining order, it was entitled to demand obedience from the petitioner. Under such circumstances, its order

> "* * * must be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case." (Part of the above quotation from the *Howat* case. This quotation is to be found beginning on page 189 of 258 U. S.)

Because of the foreging factual similarity to the *Howat* case, the rule of the *Howat* case applies in the present pro-

ceeding. Here, as in the *Howat* case, the order of the trial court must be obeyed until reversed, either by itself or by a higher court. Here, as in the *Howat* case, disobedience of such order is contempt of court and may be punished as such.

V.

A. An Attorney Who Advises His Client to Violate an Order of a Court Is Guilty of Contempt.

As stated above, the rule is beyond question. A lawyer may not be an officer of the court within the peculiar meaning of 18 United States Code (1952) 401(2) as stated in *Cammer v. United States*, 350 U. S. 399, but he certainly is an officer of the court in the usual and traditional meaning of that phrase. As such he is held to a high degree of responsibility in his conduct toward the court and in obedience to its orders.

B. Although an Attorney May Give a Bona Fide Opinion as to the Validity of a Court Order, He May Not Advise His Client to Violate Such Order.

The distinction between the act of a lawyer in telling his client in good faith that in his opinion, an order of a court is invalid, and the act of a lawyer in telling the client to go ahead and violate the order, is well established in many states. Some of the cases are collected in an annotation entitled "Liability of the Lawyer for Advising Disobedience" in 39 *Columbia Law Review* 433 (1939) at footnotes 16 and 66. The Ohio Supreme Court adopts such distinction in its opinion in the present case (R. 69, top).

A distinction of this kind is one which lies within the power of each state acting through its courts and/or legislature, to adopt if it so desires.

C. The Petitioner Advised Disobedience of the Order and Repeated the Same in Open Court. He was Guilty of Direct Contempt.

That he gave such advice is clearly admitted by him, not once but several times.

On June 1 the court asked the respondent whether the union officials had been told by some one to violate the court order and he answered:

> "I can advise the Court now that they were told by me" (R. 23).

Later at the same hearing the court said:

> "You could wait until we had a final hearing on the entire matter; that was the only way you could have done it; you could obey the order of the Court" (R. 24).

In answer, the petitioner said:

> "No, we could not have done it that way. Then my client would have had to give up the only vital right they had to bargain. The only other way this matter could have come up is the way it did come up, that is, by a contempt action in this Court, because this is the only way this matter could have been heard" (R. 24).

On June 3, at a resumption of the same session, the court said:

> "You also advised them to violate an order of the Court, too" (R. 27).

The petitioner answered:

> "I did" (R. 27).

After a few lines of discussion concerning another matter, the court said:

> "All right, now, I will—we will proceed from there. It is very apparent from what you have said here this

morning that you are in contempt of Court. Now, I will give you until next Tuesday to purge yourself of contempt of Court, and you may select a lawyer of your own choosing; if you don't select a lawyer of your own choosing, I will appoint an attorney for you to represent you. I don't want you representing yourself. (R. 28).

Shortly thereafter the petitioner said:

"Your Honor, I have taken the only course open to me, but I don't feel that we are in contempt of Court. I don't want to discuss that at this time; I am not concerned with that at all" (R. 28, lower half).

The Charge in Contempt which the judge filed on June 6, 1960, stated, among other things:

"Whereas, one Merritt W. Green, II, legal counsel for the defendants, did with full knowledge of said restraining order, advise and counsel said defendants to disobey said order; and

"Whereas said defendants and others, acting on the advice and counsel of said Merritt W. Green, II, did disobey said order by continuing picketing at or near the vicinity of the premises of the plaintiff at 26 Main Street, Toledo, Ohio, and

"Whereas, said Green, after being notified in open Court by the undersigned, that he was in contempt of Court did and does continue to advise the said defendants to continue to disobey said order of the Court;

"Said Green is hereby charged with being in contempt of Court and a hearing thereon is set for June 7, at 10:30 o'clock, a. m., and the clerk is instructed to enter this charge on the journal of the Court" (R. 29-30).

During the hearing on June 7, counsel for the petitioner asked for permission to read a statement by the petitioner (R. 35). The court granted such permission (R.

36). In his statement the petitioner said, among other things, that at a meeting between the trial judge and the petitioner and the petitioner's associate, the associate told the judge that regardless of the private opinion of the court respecting the validity of the contract, the court had no jurisdiction and that he was forcing the petitioner and the latter's associate to advise their clients "of their rights not to obey the order." The judge "replied that in such an event that they would be cited for contempt" (R. 40, center of page; see also R. 67, top). The context indicates that when the petitioner heard his associate say these words to the judge, the petitioner approved of them and accepted them as his own.

From the foregoing passages taken from the record, it is manifest:

1. That the respondent clearly and unequivocally admitted in open court that he had advised his clients to violate the order, knowing well that he ran a risk of being cited for contempt; and

2. That he defiantly told the judge in open court that

> "Your Honor, I have taken the only course open to me, but I don't feel that we are in contempt of Court. *I don't want to discuss that at this time, I am not concerned with that at all.*" (R. 28, emphasis supplied.)

His last sentence "I don't want to discuss that at this time, I am not concerned with that at all," showed a contumacious defiance in open court of the court's authority. The plain meaning of his words, taken in the light of their context, indicates that he did not care what the court thought and that he, the respondent, intended to continue to defy the court. This in itself was *direct* contempt, committed in open court. These words alone were sufficient grounds

for the court to adjudge him guilty of direct contempt on the spot, without further formality or hearing (*Ex parte Terry*, 128 U. S. 289; *Sacher v. United States*, 343 U. S. 1). This alone should be enough to cause this Court to dispose of this case by affirming the judgment of the Ohio Supreme Court.

D. The Purpose of the Petitioner in His Contemptuous Acts Was to Force the Court to Grant an Immediate Hearing on the Restraining Order.

When the petitioner advised his clients to disobey the court order, he was not acting blindly nor was he moved by sudden and unreasoning passion. He had discussed the matter with other counsel for the union before he reached his decision (R. 37). In an apparently informal discussion between the trial judge, the attorney for the employers, and the petitioner himself, the petitioner told the judge that he had a motion to vacate prepared and would gladly file it immediately *if he could obtain an early hearing.* (Emphasis added.) In the language of the statement which the petitioner's counsel read on June 7, 1960, "The court flatly refused saying that he would not hear the motion until the restraining order was obeyed. I then asked (the court) that if the restraining order was obeyed would it be possible to obtain a hearing within the week and he replied that it would not" (R. 43, lower half of page).

At the hearing on June 1, the following dialogue between the petitioner and the court occurred, namely,

> "The Court: You could at least obey the order of the Court and then come in and express whatever criticism you had and purge yourself.
>
> "Mr. Green: There were only two ways we could do this.
>
> "The Court: You could wait until we had a final hearing on the entire matter; that was the only way

you could have done it; you could obey the order of the Court.

"Mr. Green: No, we could not have done it that way. Then my clients would have had to give up the only vital (fol. 30) right they had to bargain. The only other way this matter could have come up is the way it did come up, that is, by a contempt action in this Court, because this is the only way this matter could have been heard. I will say to this Court that on Friday after the hearing of the Board of the International Longshoremen's Association in Chicago, where they were negotiating this matter, I explained the entire situation to them and they were reluctant to give up their rights as far as their economic rights were concerned and it was apparent that this Court had made a Court order that was invalid on its face.

"The Court: But that was before it was ever submitted into Court you did that.

"Mr. Green: Oh, there is no question about that" (R. 24-25).

At the hearing on June 7, in the course of the petitioner's prepared statement, he told about calling one of the counsel of the International Longshoremen's Association in Chicago on the long-distance telephone. The Petitioner said:

"I then told him that if we were correct on the law that the order of the court was wholly invalid then the only alternative would be to defy the order of the court in the hopes that Mr. Ragan would file contempt proceedings which would undoubtedly be heard immediately and from which we could instantly appeal to the Court of Appeals to determine the jurisdiction of the court" (R. 41). (NOTE: The Mr. Ragan to whom reference is made is Robert C. Ragan, Esq., an attorney for Toledo Marine Terminals, Inc. (R. 12).)

The foregoing passages in the record show that the petitioner knew what he was doing when he advised his

clients to disobey. He did not act blindly but took a calculated risk. Therefore he is not entitled to any leniency such as might well be shown to a lawyer who without deliberation temporarily forgot the respect which he owed to the Court. Mere hot-headed impudence would have been bad enough. Cold-blooded contempt, committed in the course of tactics designed to coerce the court into granting an immediate hearing, is far worse.

E. Since the Petitioner Was Guilty of Direct Contempt, the Court Had Authority to Punish Him Summarily.

This Court has long recognized the right of a court to punish summarily a person guilty of direct contempt, that is, contempt committed in open court. The above quoted passages from the record and particularly the one in which the petitioner said:

> "Your Honor, I have taken the only course open to me, but I don't feel that we are in contempt of Court. I don't want to discuss that at this time, I am not concerned with that at all" (R. 28),

show clearly that the petitioner was not merely admitting that he had committed an indirect contempt away from the court; they also show that he was defiantly repeating the same in the courtroom itself; that he was trying to justify his conduct; that he was unwilling to discuss the matter with the court; and that he was not concerned with the matter at all.

The Ohio Court of Appeals clearly indicated that the petitioner's contempt was direct (R. 53, bottom).

Under such circumstance, the Court had ample authority to find him guilty of contempt then and there, without further formality or hearing. Ex parte *Terry*, 128 U. S. 289; *Sacher v. United States*, 343 U. S. 1.

F. Even if the Petitioner Were Guilty of Only Indirect Contempt, the Court Did Not Deprive Him of His Constitutional Rights When It Found Him Guilty and Sentenced Him. Cooke v. United States, 267 U. S. 517, Re Oliver, 333 U. S. 257, and Re Murchison, 349 U. S. 133, Are Distinguished.

The petitioner in his brief quotes a number of cases in support of his contention that the trial court deprived him of his constitutional rights when it found him guilty of contempt. Most of them were cases of ordinary criminal prosecutions and therefore did not present the problems which are peculiar to cases of contempt of court. Three cases, however, stand out since they did involve contempt. They are *Cooke v. United States*, 267 U. S. 517, *Re Oliver*, 333 U. S. 257 and *Re Murchison*, 349 U. S. 133. None of them applies to the present situation.

Cooke v. United States, 267 U. S. 517, decided in 1925, grew out of a letter which a lawyer, with the assistance of his client, sent to the judge before whom the lawyer was appearing in a series of cases involving the client. The letter accused the judge of bias. The client handed the letter to the judge in chambers. Eleven days later, the court caused both men to be arrested and brought into court. The judge immediately and summarily found them guilty and sentenced them. This Court subsequently decided that they had been deprived of their constitutional rights. After discussing the power of a judge to punish summarily where the contempt is committed in open court, this Court said, beginning on page 536:

> "When the contempt is not in open court, however, there is no such right or reason in dispensing with the necessity of charges and the opportunity of the accused to present his defense by witnesses and argument. The exact form of the procedure in the

prosecution of such contempts is not important. The court in *Randall v. Brigham*, 7 Wall. 523, in speaking of what was necessary in proceedings against an attorney for malpractice, said:

"'All that is requisite to their validity is that, when not taken for matters occurring in open court in the presence of the judges, notice should be given to the attorney of the charges made, and opportunity afforded him for explanation and defense. The manner in which the proceedings shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation.'

"The court in *Savin, Petitioner*, 131 U. S. 267 applied this rule to proceedings for contempt.

"Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think that this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed" (266 U. S. 517, 536).

In the case now pending, the petitioner has received all the rights above listed or their substantial equivalent.

As to the charge of contempt, the petitioner knew from the beginning that his act would be contemptuous. He actually committed the act (by advising his clients to disobey the order) for the purpose of inviting a proceeding in contempt (R. 24, 25, 41).

He was given an opportunity to meet the charge by defense or explanation; but instead of meeting the charge, he told the court,

" I don't want to discuss that at this time, I am not concerned with that at all" (R. 28).

He was given an opportunity to be represented by counsel. In fact the court told him, "if you don't select a lawyer of your own choosing, I will appoint an attorney for you to represent you" (R. 28). At the hearing on June 7, he was represented by two counsel (R. 31).

At no time did the petitioner indicate that he wished to call any other witness. Although he was not permitted to take the stand in person on June 7 (R. 34), the court allowed his counsel to read into the record a prepared statement which covered everything the petitioner would have said if he had taken the stand (R. 35-45). The petitioner's own counsel asked for permission to read such prepared statement (R. 35). He thereby waived any objection to the refusal of the court to allow the petitioner to testify in person and cured any harmful consequences which might have been caused by such refusal. Indeed, there never was any dispute as to the facts in this case. The whole contempt proceeding rests upon what the petitioner voluntarily said in open court.

Because of the foregoing facts, the petitioner has received substantially all of the rights to which he was entitled according to *Cooke v. United States*, 267 U. S. 517.

The two later cases of *Re Oliver*, 333 U. S. 257, and *Re Murchison*, 349 U. S. 133, did not involve a lawyer who admitted his own contempt voluntarily in open court and then tried to justify it. Both of them arose under two successive versions of the Michigan so-called "one man grand jury."

In each of these two cases, an unwilling wretch was compelled to attend the "one man grand jury" and testify about crimes involving bribery and corruption of public

officials. In each of the two cases, the judge, who acted as a grand jury, became convinced that the witness was telling lies and after a perfunctory hearing in which none of the constitutional rights of the witness was protected, found him guilty of contempt and sentenced him. In the *Oliver* case, the entire proceedings were secret. In the *Murchison* case the initial stages were secret but the hearing upon the charge of contempt was in the open. However, it also was conducted in so perfunctory a manner as to violate the rights of the witnesses. The *Murchison* case also included another unwilling witness who refused to testify unless his counsel could be present. Such second witness was also sentenced for contempt.

The petitioner in the present proceeding was not deprived of any of the rights to which he was entitled under the *Oliver* case or the *Murchison* case.

1. The petitioner had reasonable notice. Throughout the entire period he was fully aware of all that was being done. He knew what he was doing when he advised his clients to violate the restraining order (R. 23-25, 27-30).

2. He had public hearings on June 1, June 3 and June 7.

3. He had a reasonable opportunity to defend himself. The trial court told him that he ought to be represented by counsel and that if he did not select a counsel, the trial court would appoint one (R. 28). In fact he was so represented on June 7 (R. 31).

4. Any objection which the petitioner might have had to the refusal of the trial court to permit him to testify under oath (R. 35) was waived when his counsel asked leave to read, and was allowed to

read, into the record what the petitioner would have testified had he been allowed to take the stand (R. 35 through 45).

5. Since the petitioner, in open court, freely admitted that he had advised his clients to disregard the temporary restraining order, no witnesses were called and hence he was not deprived of his right to examine them (R. 23-25, 27-30).

The Ohio Court of Appeals and the Ohio Supreme Court both considered at length the matter of the petitioner's constitutional rights. Both courts agreed that such rights had not been violated (R. 48-59) (Ohio Court of Appeals); (R. 63-70) (Ohio Supreme Court).

CONCLUSION.

This Brief is based upon a fivefold foundation, namely,

1. The principle that a petitioner who has failed to comply with Rule 23, Section 1(f) of the Revised Rules of this Court, may not raise at this time either the question of the jurisdiction of the trial court to find him guilty of contempt or the question of his having been denied due process of law during the contempt proceedings.

2. The principle that a state court may enjoin picketing when there is danger to life, limb or property.

3. The principle that a state court may enjoin even peaceful picketing when such is in violation of a collective bargaining contract.

4. The principle that a court of general jurisdiction, when confronted with a request for a restraining order, may determine whether it has jurisdiction to issue the same; and that pending such determination, an attorney for the defendant must respect such order if the court makes it.

5. The principle that a court may punish summarily an attorney who, by advising his client to disobey the court's restraining order and reiterating in open court his contemptuous attitude, is guilty of direct contempt, and that even if the petitioner's contempt had been indirect rather than direct, he still has not been deprived of due process of law by the way in which the court handled the contempt proceedings against him.

For the foregoing reasons the Ohio trial court did not commit any error or overstep its authority when it found the petitioner to be guilty of contempt and sentenced him. The Supreme Court of Ohio acted properly when it refused to release him in a proceeding of Habeas Corpus.

Therefore the judgment of the Supreme Court of Ohio should be affirmed.

Respectfully submitted,

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FILED

In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 312.

IN THE MATTER OF THE PETITION FOR A WRIT OF HABEAS CORPUS FOR MERRITT W. GREEN II.

MERRITT W. GREEN II,

Petitioner.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 312.

IN THE MATTER OF THE PETITION FOR A WRIT OF HABEAS CORPUS FOR MERRITT W. GREEN II,

MERRITT W. GREEN II,

Petitioner.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

REPLY BRIEF FOR PETITIONER.

I. The Respondent Misconstrues Rule 23.

The respondent's brief begins by asserting that Section 1 (f) of Rule 23 of the Revised Rules of this Court applies to the petitioner's brief in this case. Assuming that assertion to be correct, the claim is made that the petitioner's failure to comply with Rule 23 results in a forfeiture of his right to have this Court consider the federal questions which are before the Court by reason of the granting of the Petition for Certiorari to the Supreme Court of Ohio.

We suggest that the respondent has misconstrued the contents of Section 1 (f) of Rule 23, which have reference only to the "Petition for Certiorari". The respondent's references and arguments in this connection would seem to be completely invalid.

II. Respondent Injects Issue Not Heretofore Considered on Petition for Certiorari or by Ohio Courts.

The respondent not only seeks to change the substance of the questions presented when this Court granted certiorari to the Supreme Court of Ohio but does, it seems clear, attempt to inject at least one entirely new issue into this case.

We have particular reference to question 3 at page 2 of the respondent's brief and the entire subdivision III which begins on page 14 and continues on through page 20.

Even though the request for injunction filed in the Court of Common Pleas by the Toledo Marine Terminals, Inc. was in the form of an action for breach of a no-strike clause in a collective bargaining contract, the right of a state court to issue an ex parte injunction denying members of a labor union the right to picket peacefully because of an alleged violation of a no-strike clause in a collective bargaining contract was not an issue considered by the Ohio Court of Appeals or the Supreme Court of Ohio. The question was not urged or suggested by the petitioner in his Petition for Certiorari or by the respondent in opposition to the petition.

A claim for state court jurisdiction predicated on a breach of contract action was not made by the Ohio courts simply because it was made clear to the Court of Appeals at the June 9 habeas corpus proceeding that the labor dispute which began with a strike on May 15th continued on through the time when the petition for injunction was filed (R. 3) and was finally settled on the day (June 9) the Court of Appeals proceedings took place.

The parties also told the Court of Appeals, during the oral argument, that the labor dispute which ended in a settlement on June 9 resulted in a valid collective bargain-

ing contract being executed containing different terms and conditions than the incomplete contract attached to the petition for injunction as an exhibit. In any event, the Ohio Court of Appeals and the Supreme Court of Ohio did not consider the action in the Court of Common Pleas as presenting the issue sought to be injected into this case now by the respondent. (R. 50, last line 64, 65, top.)

III. The Essential Facts Supporting Petitioner's Contentions Not Disputed.

Aside from the tailoring of facts in an effort to give support to the new issue sought to be injected into this case, the respondent's answer brief, with one or two exceptions to be noted hereafter, is in substantial agreement with the statement of the case set forth in the petitioner's brief. The essential facts are not in dispute. For instance:

> The labor dispute which caused the strike on May 15, 1960 was still in progress on May 27, 1960, the day the unfair labor practice charge was filed by the union and the action for injunction was started by the employer. (R. 3.) Mr. Ragan, attorney for the employer, referring to the unfair labor practice charge filed against the employer for refusal to bargain, said:
>
> "The unfair labor practice charge was not based on the contract. It alleged in a vague sort of way that the company, the employer, Toledo Marine Terminals, had refused to bargain collectively, although at the time it was filed negotiations were almost continually under way. * * *."
>
> Even though the men had returned to work for two days, the signing of the agreement by the President of the company and some of the union officials on the night of May 26th obviously did not end the labor dispute which started with the picketing on May 15th;

immediately thereafter (6:00 A. M., May 27th) picketing was resumed. (R. 10, 18.)

The original Common Pleas Court action sought only an injunction to prohibit picketing. The action was not one for specific performance. (R. 11, Par. 12.)

The picketing, notwithstanding the court order, was continued on the basis of a decision by the union officials in Chicago in an effort to obtain a court hearing on the question of State vs. Federal jurisdiction via habeas corpus. (6, Resp. Brief; R. 25, 41.)

The picketing was in all respects peaceful. This was an agreed fact. (R. 2.) See also R. 5 where pictures which were part of the record before the Court of Appeals were described.

Also at page 13 of the respondent's brief it is admitted that the petition upon which the ex parte injunction was issued did not contain an allegation of one fact relating to mass picketing or picketing accompanied by violence or intimidation.

Respondent agrees (Brief 5, 33) that petitioner was not permitted to testify at his contempt "hearing," June 7, 1960.

IV. Petitioner Did Not Tell Union to Violate Order. Client Only Advised of Status and Remedy Available in the Circumstances then Prevailing.

The respondent's brief at page 4, where it is claimed that the union was told by him to violate the "no-picketing" order of the court, is not only inaccurate but inconsistent with the statement at page 6 where the respondent concedes that the petitioner told the court that the picketing continued as a result of a decision of the union officials.

The petitioner had advised the union officials in Chicago that in view of the issuance of the ex parte injunc-

tion and the court's adamant refusal to set the matter for hearing to consider the question of jurisdiction, continuation of picketing and the filing of an application for a writ of habeas corpus if the pickets were held to be in contempt would result in a hearing where the jurisdiction issue could be raised. (R. 24, 25, 41.)

What the petitioner did was advise his clients in Chicago of the status of the court action in Toledo and what course of action might be available to them under the then prevailing circumstances. The whole record does not, we believe, justify the assertion that the petitioner told the union to violate the court order or that the union continued picketing for the purpose of defying constituted authority. (See dissenting opinions—R. 55, 69. Also R. 41, 43.)

V. Respondent's Claim That Offer to Prove Cured Denial of Trial and that Denial of Due Process Was Not Asserted is not Tenable.

At page 7 of the respondent's brief (2nd paragraph) it is suggested that the petitioner did not, during the hearings in the Common Pleas Court on June 1, June 3 and June 7, raise the question of "due process" with respect to the way his "own contempt of court" hearings were being conducted in that court. Obviously the petitioner could hardly raise the question at the June 1st and June 3rd hearings that he was denied due process at his "own contempt of court" hearing on June 7th. The June 1 and 3 hearings involved only the union officials charged as being in contempt.

The action of the court in announcing at the outset of the June 7th proceedings that there would be no trial or hearing (R. 34) and in refusing the petitioner's request to testify (R. 34, 35) was in and of itself denial of due

process, a fact which the respondent somehow seems to believe was cured when the petitioner's counsel, with substantial opposition from the court, read into the record, as an offer to prove, what the petitioner would have testified to had he been permitted to take the stand (R. 35).

We suggest that an offer to prove read into the record for the benefit of a reviewing court can hardly be an acceptable substitute for a complete hearing or trial before a court which has not already determined guilt.

The respondent's brief indicates a refusal to recognize that the offer to prove read into the record at the June 7th hearing became the undisputed and uncontradictable evidence before the Court of Appeals in the habeas corpus proceedings, and that despite the respondent's inability to recognize where the denial of due process was asserted, both the Court of Appeals and the Supreme Court of Ohio considered that question as one of the issues in the case.

VI. Acceptance of Respondent's Theory of State Court Jurisdiction Would Repudiate the Doctrine of Federal Pre-emption.

The respondent's advocacy of the proposition that state courts are entitled to use ex parte injunctions to prohibit peaceful picketing even in the absence of any claim of mass picketing, public disorder, violence, or threat of violence, is patently violative of many decisions of this Court. To accept such a proposition would require a complete reversal of the pre-emption doctrine, now firmly a part of national labor policy.

The strained reasoning which is necessary to suggest the approval of the use of the ex parte injunction in peaceful picketing cases is evident in the two paragraphs set forth under Section (b) of the respondent's brief on page

13. There the respondent admits that the petition did not contain an allegation of one fact relating to mass picketing or picketing accompanied by violence or intimidation and that the petition contained only conclusions on the part of the pleader to the effect that if the court did not enjoin the "unlawful" picketing, the picketing would "result in danger to life and limb of the employees of plaintiff company and irreparable loss and damage to the plaintiff company".

The respondent then suggests that merely pleading these conclusions without basing them on any facts "is enough to justify the court in taking preventative steps." This, the Court will note, is coming out foursquare for the proposition that state courts should be permitted to enjoin picketing in labor disputes involving interstate commerce without regard to the conditions prevailing when the injunction is sought.

The respondent suggests that in our case the absence of mass picketing or picketing accompanied by violence or intimidation at the time the petition was filed was "only because the restraining order anticipated such violence and prevented it from happening" (Resp. Brief, 13). However, the respondent does not explain just how the restraining order which had not been issued at the time the plaintiff drafted the petition, prevented violence from happening before the petition was filed.

VII. Nature of Dispute and Conduct Involved, Not Mode of Regulation, Determines Tribunal to Decide Issues.

As we have already pointed out, the respondent attempts to bring before this Court an issue which has not been considered by the Ohio courts and which has not heretofore been a part of the proceedings in this Court.

Under any circumstances, we say that the issue of

whether "a state court may enforce a collective bargaining contract" (respondent's brief 14) is not a part of this litigation. The answer to that bare question, we believe, is no longer open to argument. The question, if it were appropriate at this time, would be whether the form of action filed in a state court is determinative of the question of State versus Federal jurisdiction.

It is the nature of the dispute or controversy as well as the conduct sought to be enjoined, and not the mode of regulation or the cause of action upon which a suit is based that determines which tribunal has a right to decide the issues involved.

In *San Diego Building Trades Council vs. J. S. Garmon,* 359 U. S. 236 (1959) the court held, among other things, that state courts, in an action to enjoin peaceful picketing, are not to determine whether the court has jurisdiction but rather to determine whether or not the dispute and activity sought to be enjoined is arguably or potentially within the jurisdiction of the National Labor Relations Board, deferring to that latter tribunal full authority to determine whether the dispute or controversy or conduct of the respective parties is a protected, unprotected or prohibited activity under the Labor-Management Relations Act. Any doubt, this Court held, must be in favor of the N. L. R. B. jurisdiction.

VIII. The Respondent's Claim That Assumption of Jurisdiction Creates Jurisdiction Would, as Here, Effectively Nullify Federal Law.

In Section 4 of the respondent's brief starting at page 21, the respondent urges this Court to adopt a rule embracing the effect of the Ohio Supreme Court's decision holding that even though a court does not have jurisdic-

tion over the subject matter of an action, assumption of jurisdiction, nevertheless, gives the court a right to issue valid orders until such time as that particular court determines that it is lacking in jurisdiction.

The respondent says that "the Ohio court, when asked to issue a restraining order, has a right to determine its own jurisdiction," and that "pending such determination the petitioner was obliged to obey such order."

The Court will note that here the respondent is contending for a proposition somewhat different than the one primarily relied upon by the Ohio courts to justify the demand for obedience of an order issued to preserve the status quo pending a hearing on the merits of the subject matter over which the court has jurisdiction (conditions not present in our case).

We have, in our principal brief beginning at page 35 and through page 38, pointed out where this case is clearly distinguishable from the bona fide status quo cases of *United States vs. John Shipp, et al.*, 203 U. S. 563 (1906) and *United States vs. United Mineworkers, etc.*, 330 U. S. 258 (1947).

The proposition now contended for by the respondent is, in effect, that an ex parte temporary injunction issued out of a court of general jurisdiction must be obeyed, however erroneous the action of the court may be, until the decision of the initial court in determining that it has jurisdiction over the subject matter is reversed either by itself or by a higher court.

In contending for this proposition respondent relies upon *Howat vs. Kansas*, 258 U. S. 181 (1922). The *Howat* case, it seems to us, is not applicable to the issues in this case as is evident from a brief examination of the issues which were before the court there.

The defendants there were originally charged with conspiring, threatening and directing the calling of a general strike in the coal mines in certain counties in Kansas which, if a cessation of work resulted, would endanger the peace and order of the communities in which the coal mines were located. It was charged also that in pursuance thereof they were intimidating their co-workers and other employees of the mines and further, that the purpose of the conspiracy was to stop the operation of the railroads, buildings, institutions and industries of the State in the conduct of its governmental affairs, etc. etc.

The defendants claimed that the Industrial Court Act, under which the proceeding against them was brought, was void and for that reason the state court was without power to issue an injunction restraining a strike in the coal mines. After the introduction of evidence, the court made permanent the temporary injunction already awarded, which injunction, in addition to prohibiting a strike, enjoined the defendants from maintaining and carrying on a conspiracy with the intent to evade the provisions of the Industrial Court Act. *This judgment was not appealed.*

Thereafter the defendants were charged in an affidavit filed by the Attorney General with violating the injunction by combining to order and compel a strike at two mines.

At the contempt hearing where the defendants were represented by counsel, they answered attacking the validity of the Industrial Court Act and of the permanent injunction. The court, after a full hearing, found the averments of the accusation were sustained.

On appeal the Supreme Court of Kansas held that the District Court in the original action had general power to issue injunctions in equity and that, even if the issuance of the injunction was erroneous, the judgment was not void,

and the defendants were precluded from attacking it in a collateral proceedings (the collateral proceedings being the attempt to again test, in the contempt proceedings, the validity of the Act which created the Court of Industrial Relations and the validity of the permanent injunction).

The Kansas Supreme Court noted that aside from the Industrial Court Act, the district court also had power to issue the permanent injunction on principles identical with those applied in abatement of public nuisances. The court held that, if the injunction order was erroneous, jurisdiction was not thereby forfeited; that the error was subject to correction only by the ordinary method of appeal.

This brief resume of the facts in the *Howat* case clearly illustrates the difference in the principle involved in our case and the one that was involved in *Howat*. There, of course, the Kansas court had jurisdiction over the subject matter of the injunction case on the basis of provisions in the Industrial Court Act and, as the Supreme Court pointed out, on the basis of abating a public nuisance. That injunction action was fully tried on the evidence and the court issued a permanent injunction order. The defendants did not appeal that order. Instead they made the collateral attack on the injunction order.

In our case, as pointed out in our principal brief, jurisdiction over the subject matter of the action has been effectively withdrawn from the States by the Labor-Management Relations Act of 1947. Over and above what we have already said relative to the distinction between *Howat* and our case, we repeat what we have already said in our principal brief:

The Ohio court had no right to arrogate to itself jurisdiction which has been withdrawn from the state courts by the Labor-Management Relations Act of 1947 because the labor dispute and controversy here was arguably subject to the jurisdiction of the National Labor Relations Board.

IX. Respondent's Brief Gives Distorted Picture of Facts.

Subdivision V of the respondent's brief, at least Sections A, B, C and D thereof, seems to be fashioned to give the appearance that the petitioner's actions on behalf of, and his advice to, his clients were motivated by a spirit of defiance rather than being an honest effort to obtain justice for his clients within the framework of the law governing labor-management relations affecting interstate commerce.

We suggest that the excerpts from the record used in the respondent's brief on page 25 through the top of page 30 are taken out of context from the record for that purpose. The picture the respondent attempts to paint through this method is distorted, to say the least. It is not justified on the basis of the record and is, we suggest, completely erroneous.

We have, we believe, covered fully in our brief (pp. 52-62) the right of a lawyer acting in good faith and in the honest belief that his advice is well founded and is in the just interests of his client, to fully advise and represent his client in, as in this case, the course of action the client decides to take.

There is nothing in the respondent's brief on this subject which warrants further discussion here.

X. Claims of Direct Contempt and of Waiver and "Cure" of Denial of Due Process are Fallacious.

The respondent's brief makes the claim (p. 30) that the petitioner was guilty of direct contempt despite the fact that the Ohio courts did not so hold and in face of the obvious belief of the trial court that the conduct complained of constituted indirect contempt. That this is so is clear from the fact that the Judge personally filed writ-

ten charges under the provisions of Section 2705.02 and 2705.03 of the Revised Code of Ohio. (R. 29.)

If the trial court thought the petitioner guilty of direct contempt, the court had authority to act summarily not only by reason of the court's inherent power, but by reason of the provisions of Section 2705.01 of the Ohio Revised Code which reads:

> "A court, or Judge at chambers, may summarily punish a person guilty of misbehavior in the presence of or so near the court or Judge as to obstruct the administration of justice."

Section 2705.02, Ohio Revised Code enumerates acts of indirect contempt for which a person may be punished and Section 2705.03 R. C. provides that in proceedings under Section 2705.02 a charge in writing shall be filed and an opportunity given to the accused to be heard, etc. etc.[1] The record in this case, we submit, does not justify the respondent's claim that the court was dealing with a direct contempt.

The respondent argues that even if indirect contempt had been the proper charge, the petitioner was not deprived of due process when the court found him guilty and sentenced him without a hearing or a trial.

The respondent admits at page 5 of its brief that the trial court refused the petitioner the right to testify at the June 7th proceedings. There is no denial that at the beginning of those proceedings the court made it clear that "you are not here for any hearing or trial." (R. 34.) The respondent now asserts that "any harmful consequences" of the refusal of the court to hold a hearing or allow the petitioner to testify or call witnesses were cured when "the

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[1] Ohio Revised Code sections 2705.02 and 2705.03 are set out and discussed in the principal brief at pages 17, 66 and 73.

offer to prove" was read into the record by counsel. (Brief p. 33.)

The contents of the claim of a waiver and "cure" made by the respondent at page 33 of its brief clearly stamps these contentions to be completely fallacious. Nothing more, we suggest, need be added by us.

CONCLUSION.

There is nothing in the respondent's brief which warrants affirmance of the Ohio decisions. On the contrary, we believe that the petitioner's release should be ordered.

Respectfully submitted,

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